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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 176

ALICE MASTEN SPENCER, as Administratrix, etc.,
Appellant,

vs.

THE HIBERNIA BANK, a corporation, et al.,
Appellees.

ALICE MASTEN SPENCER, et al.,
Appellants,

vs.

THE HIBERNIA BANK, a corporation, et al.,
Appellees.

MARIAN MEL, as Special Administratrix of the Estate of John Mel, Deceased,
Appellant,

vs.

THE HIBERNIA BANK, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF RICHARD M. TOBIN, DECEASED, FLORENCE ADELE TOBIN, JOSEPH O. TOBIN, EDWARD J. TOBIN, CYRIL R. TOBIN, CONSTANCE DE YOUNG TOBIN, BEATRICE TOBIN RAOUL-DUVAL, RUTH HAWKINS TOBIN, ABBY PARROTT TOBIN, CELIA TOBIN CLARK, RICHARD RAOUL-DUVAL, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF CHARLES J. BARRY, DECEASED, ERNEST O. MCCORMICK, JR., LEO O'GRADY, SHELDON G. COOPER, JOSEPH O. TOBIN, TRUSTEE, CYRIL R. TOBIN, TRUSTEE, RICHARD RAOUL-DUVAL, TRUSTEE, ERNEST O. MCCORMICK, JR., TRUSTEE, SHELDON G. COOPER, TRUSTEE, DOES ONE TO FIFTEEN,
Appellees.

NOTICE OF APPEAL AND JURISDICTIONAL STATEMENT

M. MITCHELL BOURQUIN,
711 Crocker Building, San Francisco 4, California.

GEORGE OLSHAUSEN,
1238 Pacific Avenue, San Francisco 9, California,

Attorneys for Appellants.

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In the

District Court of Appeal

State of California

FIRST APPELLATE DISTRICT

DIVISION ONE

ALICE MASTEN SPENCER, as Administratrix, etc., *Plaintiff and Appellant,* vs. THE HIBERNIA BANK, a corporation, et al., *Defendants and Respondents.*	No. 1 Civil 19,193
ALICE MASTEN SPENCER, et al., *Plaintiffs and Appellants,* vs. THE HIBERNIA BANK, a corporation, et al., *Defendants and Respondents.*	No. 1 Civil 19,194
MARIAN MEL, as Special Administratrix of the Estate of John Mel, Deceased, *Plaintiff and Appellant,* vs. THE HIBERNIA BANK, et al., *Defendants and Respondents.*	No. 1 Civil 19,195

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Alice Masten Spencer, as Administratrix with the will annexed of the

Estate of N. K. Masten, Deceased, Alice Masten Spencer, Kenneth K. Kendall, Isabel Kendall Lowden, Elizabeth Taylor Smith, Pedro Wessel, Dagmar Wessel Marshall, Freddie Wessel, Warren Scott Wilson, Stokely Wilson, Francis P. Wilson, Mamie Dunne Silent, Dorothy Dunne, Katherine Dunne Herdman, Josephine Dunne Richmond, Margaret Dunne Buchanan, Peter M. Dunne, J. Kendall Masten, Katherine Masten Morton, Eugenie Masten Mason, Emilia Gordon Tuttle, Annette Masten, Georgia Martha Masten Judson, Nielson K. Masten, Louis C. Masten, Jerry Masten, Ruth Perkins Oyster, Margaret Perkins Trowbridge, Helen Perkins Garat, Gay Olga Masten, Warren P. Masten, Richard T. Masten, Mary Elizabeth Rogers, Margaret Louise Kendall Hollingsworth, John D. Gordon, Annie Gordon Ward, Kathleen Kendall Cooper, Gladys Maud Kendall, Frank I. Kendall, Robert T. Kendall, Bradford Manning, Christine Gordon, Helen Perkins Garat, and Marian Mel, as Special Administratrix of the Estate of John Mel, Deceased, hereby appeal to the Supreme Court of the United States from the final judgments of the District Court of Appeal of the State of California, First Appellate District, Division One, affirming judgments of the Superior Court of the State of California, in and for the City and County of San Francisco, granting summary judgments to the defendants, entered in these actions on November 28, 1960, hearing denied by Supreme Court of California January 25, 1961.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

II. The Clerk will please prepare a transcript of the entire record in cause No. 19194; include Appellants' Reply to Respondents' Supplemental Brief; Appellants' Petition for Rehearing; Appellants' Petition for Hearing by the Supreme Court, a transcript of the Second Amended Complaint and the judgment in No. 19193, and a transcript of the Amended Complaint and the judgment in No. 19195. Order Permitting Filing of Appellants' Reply to Respondents' Supplemental Brief.

III. The following questions are presented by this appeal:

A. Cal. Stats. 1862, p. 199, §4, and Cal. Stats. 1864, p. 531, §2, are unconstitutional in so far as they are construed to empower the respondent-appellee bank to destroy preexisting property and contractual rights in the corporation. So far as said destruction was accomplished before the enactment of the XIVth Amendment, it violates U. S. Constitution Article I, §10, "No state shall . . . pass any . . . law impairing the Obligation of Contracts . . ."; in so far as the destruction was accomplished after enactment of the XIVth Amendment, it also violates the prohibition of that amendment against taking property without due process of law.

B. Said statutes violate the constitutional articles named in subdivision A above in destroying property and contractual rights in the corporation without procedure.

C. Cal. Code Civil Procedure §437c is construed to deny due process of law in being held to authorize judgment without any opportunity of cross-examination of the opponents' assertions, or anything remotely equivalent.

D. So far as the holdings under sections A and B *supra* are sought to be justified upon the assertion that appellants' predecessors had no property or contractual rights, this in itself constitutes denial of federal rights under the guise of deciding state questions: Whether or not a person has a property or contractual right is itself a federal question (on which the courts of California have held both ways on the same question in the same case).

Dated: April 24, 1961.

M. MITCHELL BOURQUIN,
GEORGE OLSHAUSEN,
Attorneys for Plaintiffs and Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

ALICE MASTEN SPENCER, as Administratrix, etc., *Appellant,*

vs.

THE HIBERNIA BANK, a corporation, et al., *Appellees.*

ALICE MASTEN SPENCER, et al., *Appellants,*

vs.

THE HIBERNIA BANK, a corporation, et al., *Appellees.*

MARIAN MEL, as Special Administratrix of the Estate of John Mel, Deceased, *Appellant,*

vs.

THE HIBERNIA BANK, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF RICHARD M. TOBIN, DECEASED, FLORENCE ADELE TOBIN, JOSEPH O. TOBIN, EDWARD J. TOBIN, CYRIL R. TOBIN, CONSTANCE DE YOUNG TOBIN, BEATRICE TOBIN RAOUL-DUVAL, RUTH HAWKINS TOBIN, ABBY PARROTT TOBIN, CELIA TOBIN CLARK, RICHARD RAOUL-DUVAL, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF CHARLES J. BARRY, DECEASED, ERNEST O. MCCORMICK, JR., LEO O'GRADY, SHELDON G. COOPER, JOSEPH O. TOBIN, TRUSTEE, CYRIL R. TOBIN, TRUSTEE, RICHARD RAOUL-DUVAL, TRUSTEE, ERNEST O. MCCORMICK, JR., TRUSTEE, SHELDON G. COOPER, TRUSTEE, DOES ONE TO FIFTEEN, *Appellees.*

JURISDICTIONAL STATEMENT

A. Opinion in courts below, *Spencer et al. v. Hibernia Bank et al.* (Nov. 28, 1960), 186 A.C.A. 770, 9 Cal. Rep. 867; modified on denial of rehearing (Dec.

28, 1960), 187 A.C.A. 815. Hearing by Supreme Court denied January 25, 1961, 55 A.C. p. 2 following p. 196. Opinion of companion case: *Bennett v. Hibernia Bank* (Nov. 28, 1960), 186 A.C.A. 815, 9 Cal. Rep. 896.

B. (1) The action is one for declaratory relief, in each case asking a declaration that the plaintiffs are now members of the defendant corporation, The Hibernia Bank or cestuis que trustent, of defendants who claim to be stockholders.

The predecessors in interest of the plaintiffs were members of the defendant corporation's predecessor corporation (once removed), The Hibernia Savings and Loan Society, incorporated under the laws of California in 1859.

In 1862 (Cal. Stats. 1862, p. 199, §4), the Legislature provided that corporations could enact by-laws providing who should be members of membership corporations, and providing the circumstances under which membership could be acquired and lost.

In 1864, the Legislature provided (amending §27 of the 1862 Act) that already existing corporations could reincorporate under the Act of 1862 (Cal. Stats. 1864, p. 531, §2).

In the present decision (*Spencer v. Hibernia Bank*, 186 A.C.A. 770, 9 Cal. Rep. 867), the District Court of Appeal has held for the first time that the general language of Cal. Stats. 1862, 199, §4, *supra*, authorizes by-laws which cut off *already existing memberships* in preexisting corporations which reincorporated under the 1864 amendment (Cal. Stats. 1864, p. 531).

In the present cases, this retroactive destruction of memberships was accomplished by subsequent by-laws which provided (1) that withdrawal of cash deposit balance should forfeit preexisting membership, (2) that memberships should be henceforth nontransferable and nondescendible.

The Superior Court of the State of California, in and for the City and County of San Francisco, declared that because of the foregoing by-laws, the transferees (descendants) of the members of the 1859 corporations had no membership in the reincorporated corporation of 1864, nor in its successor, by virtue of a subsequent reincorporation of 1947. The defendants made motions for summary judgments based on affidavits. (Cal. Code Civ. Proc. §437c.) On the hearing of such motions, the plaintiffs subpoenaed defendant's records for exploratory examination in the nature of cross-examination. The trial Court excluded such examination, holding that a motion for summary judgment could be opposed only by affidavits, and had to be resisted, if at all, without the advantage of any cross-examination. It gave summary judgment for the defendants, after refusal of cross-examination or its equivalent.

The District Court of Appeal of the State of California, First Appellate District, Division One, affirmed this judgment, holding that the subsequent by-laws in question were enacted in pursuance of and authorized by the two statutes in question. (Cal. Stats. 1862, p. 199, §4; Cal. Stats. 1864, p. 531.) The

District Court of Appeal also held that by-laws (whether pursuant to statute or not) could wipe out dormant interests. The District Court of Appeal also held that a motion for summary judgment had to be resisted by affidavits only, unaided by any cross-examination, and that where the Court considered the counter-affidavits insufficient, it could render final judgment against a party without ever having accorded him the right of cross-examination (or its equivalent) on the affidavits offered in support of the motion for summary judgment.

(2) The judgment of the District Court of Appeal was rendered November 28, 1960. Its opinion was modified in the order denying appellants' petition for rehearing on December 28, 1960.

The Supreme Court of the State of California denied a hearing on January 25, 1961.

(3) The Supreme Court of the United States has jurisdiction of this appeal under 28 U.S.C. 1257 (2).

(4) Cases sustaining the jurisdiction of the United States Supreme Court on appeal: upon the upholding by a state court of a state statute:

Poulos v. New Hampshire, 345 U.S. 395, 97 L. Ed. 1105, 30 A.L.R. 2d 987;

King Mfg. Co. v. Augusta, 277 U.S. 100, 101, 72 L.Ed. 801, 803 (old practice);

A. T. & S. F. v. Pub. Ut. Comm., 346 U.S. 346, 98 L.Ed. 51;

Senn v. Tile Layers Prot. U., 301 U.S. 468, 81 L.Ed. 1229;

Darling v. Newport News, 249 U.S. 540, 592, 63 L.Ed. 759 (old practice);

Atl. Coast L. Ry. v. Phillips, 332 U.S. 168, 91 L.Ed. 1977, 173 A.L.R. 1;

Int. Coal & I. Co. v. Nat. Sur. Co., 297 U.S. 657, 80 L.Ed. 961;

Detroit U. R. v. Mich., 242 U.S. 238, 246-7, 61 L. Ed. 269 (old practice);

Appleby v. N. Y., 271 U.S. 364, 70 L.Ed. 992.

Cal. Stats. 1862, p. 199:

CHAP. CLXXXVII.—An Act to provide for the Formation of Corporations for the Accumulation and Investment of Funds and Savings.

Sec. 4. When the certificate shall have been filed, the persons who shall have signed and acknowledged the same, and such persons as may thereafter become their associates or successors, shall be a body politic and corporate, and by their corporate name, have succession for the period limited, and power—

First—To sue and be sued in any Court;

Second—To make and use a common seal, and to alter the same at pleasure;

Third—To purchase, hold, sell, convey, and release, from trust or mortgage, such real or personal estate as hereinafter provided in this Act;

Fourth—To appoint such officers, agents and servants, as the business of the corporation shall require, to define their powers, prescribe their duties, and fix their compensation, and to require of them such secu-

rity as may be thought proper for the fulfillment of their duties;

Fifth—To loan and invest funds of the corporation, to receive deposits of money, and to loan and invest the same, to collect the same, with interest, and to repay such deposits with so much of the earnings and interest as the by-laws of the corporation may provide;

Sixth—To make by-laws, not inconsistent with the laws of this State, for the organization of the company and the management of its property, the regulation of its affairs, the conditions on which deposits shall be received, the time and manner of dividing the profits, and the time and manner in which any person may become, or may cease to be, a member of the corporation, and for carrying on all kinds of business within the objects and purposes of this company.

Sec. 9. A majority of the whole number of Directors shall form a Board for the transaction of business; and every decision of a majority of the persons duly assembled as a Board, or a larger number, if the by-laws shall so require, shall be valid as a corporate act, but no real estate shall be sold, or released from trust or mortgage, except by a vote of a majority of the whole number of Directors.

Sec. 27. Corporations formed under this Act, and the members and stockholders thereof, shall not be subject to the conditions and liabilities contained in, and shall be exempt from the operation of an Act entitled an Act concerning Corporations, passed April twenty-second A.D. eighteen hundred and fifty.

Cal. Stats. 1863-4, p. 531:

CHAP. CCCCLXXI.—An Act to amend an Act entitled an Act to provide for the formation of Corporations for the accumulation and investment of Funds and Savings, approved April eleven, eighteen hundred and sixty-two. The People of the State of California, represented in Senate and assembly, do enact as follows:

Section 1. Section nine of an Act to provide for the formation of corporation for the accumulation and investment of funds and savings, approved April eleventh, eighteen hundred and sixty-two, is hereby amended to read as follows:

Section 9. A majority of the whole number of Directors shall form a Board for the transaction of business, and every decision of a majority of the persons duly assembled as a Board, or a larger number, if the by-laws shall so require, shall be valid as a corporate Act.

Sec. 2. Section twenty-seven of said Act is hereby amended so as to read as follows:

Section 27. All corporations for the accumulation, preservation, and investment of funds and savings, all Savings and Loan Societies, and all associations or societies for the like purpose, claiming in good faith to be incorporated under the laws of this State, may avail themselves of the provisions of and become incorporated under this Act by filing with the County Clerk of the county in which their principal place of business is located, and a certified copy thereof in the office of the Secretary of State, a certificate stating their intention and election to become so incorporated,

which intention and election may be made and declared by the Trustees or acting Trustees of such corporation, association, or society, or a majority thereof. The certificate stating such intention and election shall be signed by the President and Secretary of such corporation, association, or society, and shall be acknowledged before some officer competent to take the acknowledgment of deeds. Such certificate shall in other respects conform to the requirements of this Act. Corporations formed or existing under or by virtue of this Act shall not, nor shall the members or stockholders thereof, be subject to the conditions and liabilities of an Act entitled an Act concerning corporations, passed April twenty-second, A.D. eighteen hundred and fifty.

Sec. 3. This Act shall take effect from and after its passage.

§437c, Code of Civil Procedure.

Summary judgment; claim of no merit to action or no defense; affidavits; partial establishment of plaintiff's claim; appealable judgment.

In superior courts and municipal courts if it is claimed the action has no merit, or that there is no defense to the action, on motion of either party, after notice of the time and place thereof in writing served on the other party at least 10 days before such motion, supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the Court unless the other party, by affidavit or affidavits shall show such

facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. A judgment so entered is an appealable judgment as in other cases. The word "action" as used in this section shall be construed to include all types of proceedings. The word "answer" as used in this section shall be construed to include counter-claim and cross-complaint. A motion filed pursuant to the provisions of this section shall be considered a pleading.

The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto.

The affidavit or affidavits in opposition to said motion shall be made by the plaintiff or defendant, or by any other person having knowledge of the facts, and together shall set forth facts showing that the party has a good and substantial defense to the plaintiff's action (or to a portion thereof) or that a good cause of action exists upon the merits. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto. When the party resisting the motion appears in a representative capacity, such as a trustee, guardian, executor, administrator, or receiver, then the affidavit in opposition by such representative may be made upon his information and belief.

If it appear that such defense applies only to a part of the plaintiff's claim, or that any part is admitted, the Court shall, by order, so declare, and plaintiff's claim shall be deemed established as to so much thereof as such defense shall not apply to, or as is admitted, and the cause of action may be severed accordingly, and the action may proceed as to the remainder of such claim. No judgment shall be entered prior to the termination of such action but the judgment in such action shall, in addition to any matters determined in such action, award to plaintiff the amount of his claim so established by the proceedings herein provided for. A judgment entered under this section is an appealable judgment as in other cases. (As amended Stats. 1957, c. 1457, p. 2780, §1.)

C. THE QUESTIONS PRESENTED BY THE APPEAL:

(1) Can a state statute authorize a corporation to cut off or destroy preexisting contractual and/or property rights of members in a preexisting corporation which chooses to reincorporate by adding new provisions (a) that membership shall be lost upon withdrawal of a deposit balance; (2) that membership shall be lost by transfer, either by descent or otherwise?

(2) Can a state statute authorize the forfeiture of allegedly dormant accounts or other interests without any procedure whatever?

(3) Can a state statute authorize rendition of judgment on the merits after total denial of cross-examination or its equivalent, such cross-examination or its equivalent having been requested by the losing party?

D. THE FACTS OF CASES ARE IN GENERAL STATED CORRECTLY BY THE DISTRICT COURT OF APPEAL.

In 1859 The Hibernia Savings and Loan Society was incorporated as a bank under the then corporation laws of California. These laws were quite rudimentary and placed considerable difficulty in the way of incorporating any bank. On the one hand they had provisions only for stock corporations (Cal. Stats. 1853, p. 87); on the other, they provided that no corporation could incur a debt greater than its paid-in capital (Cal. Stats. 1853, p. 87, §14). Under this latter statute, it was, of course, impossible to have a bank whose depositors were creditors of the bank. The alternative was to have a bank in which the depositors were co-owners of the bank. But the mutual (depositor-owner) banks as generally known in the East were non-stock banks. The California statutes, however, made no provision for non-stock banks.

In an attempt to satisfy both statutory requirements, ((1) capital stock, (2) no debts) the Hibernia incorporators in effect organized a membership bank, with nominal capital stock which was a mere bookkeeping device, i.e., each deposit of $100 was called one share. Previously each member had to make a preliminary contribution of $2, which was nonrefundable. There was no provision for loss of membership in case the entire cash balance was drawn out (in the *Spencer* case, it was shown that N. K. Masten, the plaintiff's predecessor, did in fact draw out his entire account and redeposit); nor was there any provision against transferrability, assignability, or descendibility of memberships.

In fact, the issued shares were retired and after June 27, 1863, the corporation existed without stock.

In 1862, the Legislature passed an act providing for non-stock banks (Cal. Stats. 1862, p. 199—of which §4 is now under attack), and in 1864 provided that preexisting banks might reincorporate under the Act of 1862 (Cal. Stats. 1864, p. 531, §2).

The bank reincorporated under the Act of 1864. In *Bennett v. Hibernia Bank,* 47 Cal. (2d) 540, 551, 305 Pac. (2d) 20, the previous appeal in the companion case, the Supreme Court of California said that all the members of the corporation organized in 1859 automatically continued to be members when the corporation was reorganized in 1864.

In 1947, the Hibernia Savings and Loan Society reorganized itself into a stock corporation under the title The Hibernia Bank. The transferees of two of the original members in the corporation as organized in 1859 sued for a declaration that they had membership rights through subsequent reincorporation down to the present time. The District Court of Appeal affirmed a judgment for defendants on the grounds of subsequently enacted by-laws authorized by the Acts of 1862 (Cal. Stats. 1862, p. 199) and 1864 (Cal. Stats. 1864, p. 531) and on the ground that plaintiffs' predecessors supposedly had no property rights in the first place.

Constitutional questions raised are as follows:

(1) Denial of Due Process of Law under the XIVth Amendment by Code of Civil Procedure §437c because of rendition of judgment with total denial of cross-

examination or its equivalent—Appellants' Reply to Respondents' Supplemental Brief, p. 13, filed in the District Court of Appeal by leave of court.

(2) Impairment of Obligation of Contracts and Deprivation of Property without Due Process of Law because of retroactive application of statutes authorizing corporations to enact by-laws fixing memberships and modes of acquiring and losing membership (Cal. Stats. 1862, p. 199, §4; Cal. Stats. 1864, p. 531)—Petition for Rehearing in District Court of Appeal (especially pp. 4-10) and Petition for Hearing by Supreme Court, especially pp. 7, 20-29).

(3) The issue of the constitutionality of these statutes of 1862 and 1864 was raised by the opinion of the District Court of Appeal itself. It had not previously been held or suggested that the general language of Cal. Stats. 1862, p. 199, §4, impowering corporations to fix conditions of memberships, and the modes of acquiring and losing membership, authorized the corporation to enact by-laws forfeiting (on new grounds) already existing memberships. In fact, as late as the previous appeal of the companion case, *Bennett v. Hibernia Bank,* 47 Cal. (2d) 540, 552; 305 P. (2d) 20, the Supreme Court said, "Since this by-law was adopted after Curtin became a member, it would not be enforceable against him, in the absence of his consent, if it would unreasonably deprive him of his membership rights"—without any suggestion that Cal. Stats. 1862, p. 199, §4 gave retroactive authority to wipe out memberships (although the court had previ-

ously referred to the general language of the statute. 47 Cal. 2d 540, 551).

It was therefore timely to raise the unconstitutionality of the statute applied retroactively in the Petition for Rehearing and Petition for Hearing by Supreme Court (*Missouri ex rel. Mo. Ins. Co. v. Gehner*, 281 U.S. 313, 319-20, 74 L. Ed. 870; *Gt. No. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367, 77 L. Ed. 360, 367).

(4) Moreover, the District Court of Appeal actually ruled on the claim of retroactivity, urged as a basis for the constitutional objections under Const. Art. I, §10 and Amendment XIV. On denial of rehearing, the District Court put quotation marks around the word "retroactively" (186 A.C.A. 800, l. 30) and inserted the phrase "upon appellants' hypothesis" in reference to the word "retroactively" (186 A.C.A. 800, l. 28).

In short, on denial of rehearing, the District Court of Appeal held that there supposedly was no retroactivity.

Where the state court actually rules on a claim made for the first time on rehearing, the claim is timely. *Gt. No. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367, 77 L. Ed. 360, *supra*.

(5) Apparently alternative grounds of decision themselves raise federal questions. Thus the District Court of Appeal says that appellants do not have property rights. But the existence of either contract or property rights is itself a federal question. The charge of impairment of obligation of contracts cannot

be met by saying that there is no contractual obligation. (*La. Ry. & Nav. Co. v. Behrman,* 235 U.S. 164, 170, 59 L. Ed. 175; see also *Edwards v. Kearzy,* 96 U.S. 595, 24 L. Ed. 793, 796.) A valid contract is also property (*Lynch v. U.S.,* 252 U.S. 571, 579, 78 L. Ed. 1434). The question whether a property right exists, protected by the XIVth Amendment, is itself a federal question. (*Louis K. Leggett Co. v. Baldwin,* 278 U.S. 105, 111, 73 L. Ed. 204.)

So far as the state enforces the destruction of preexisting membership rights, even independently of statute, it raises the same constitutional issues under the XIVth Amendment as the statute. *Shelley v. Kramer,* 334 U.S. 1.

(6) The references by the District Court of Appeal to the statutes of 1862 and 1864 (Cal. Stats. 1862, p. 199, §4; Cal. Stats. 1864 p. 531) as giving authority to enact by-laws forfeiting preexisting memberships may be found at the following places of the record, R. 18, (186 A.C.A. 770, 793-4, 795, 797, 799, 803). The denial of retroactivity appears in the order denying rehearing, R. 19, (187 A.C.A. 815).

E. GROUNDS WHY QUESTION REQUIRES FULL CONSIDERATION.

(1) Application of a statute to forfeit rights under a preexisting contract is impairment of obligation of contracts. *Barnitz v. Beverly,* 163 U.S. 118; *La. Ry. & Nav. Co. v. Behrman,* 235 U.S. 164, 170, 59 L. Ed. 175, *supra, Edwards v. Kearzy,* 96 U.S. 595, 24 L. Ed. 793, 796, *supra.*

(2) Even dormant interests in a bank cannot be wiped out except by procedure satisfying the XIVth Amendment. *Anderson Nat. Bank v. Luckett,* 321 U.S. 233, 240.

(3) The District Court of Appeal purports to justify the destruction of the early memberships on the ground of the administrative convenience in managing the internal affairs of the corporation (R. 18, 186 A.C.A. 770, 800). But this would be taking private property (1) for private purposes and (2) without compensation,—this being clearly in violation of the XIVth Amendment, which here incorporates the provision of the Vth against taking property for public purposes without compensation (*Pennsylvania Coal Co. v. Mahan,* 260 U.S. 393, 67 L. Ed. 322).

(4) Construing California Code of Civil Procedure §437c as authorizing judgment without any cross-examination whatever violates fundamental principles of fairness and, with them, due process of law. In *Alford v. U.S.,* 282 U.S. 687, this Court held that a reasonable cross-examination is an essential of a fair trial, and the cross-examiner need not indicate its purpose nor what he expects to elicit. Since the case came up through the federal courts, there was no mention of constitutional provisions. But due process of law has been repeatedly defined as the essentials of fairness. (*Kinsella v. U.S.,* 361 U.S. 234, 246, 4 L. Ed. 2d 268, *Buchalter v. N.Y.,* 319 U.S. 427, 429, 87 L. Ed. 1492.)

Milliken v. Meyer, 311 U.S. 457, 463:

> "The traditional notions of fairplay and substantial justice implicit in due process . . ."

Galvan v. Press, 347 U.S. 522, 530:

"fairplay—which is the essence of due process".

McDonald v. Mabee, 243 U.S. 90, 91:

"Subject to its conception of sovereignty, even the common law required a judgment not to be contrary to natural justice."

Holden v. Hardy, 169 U.S. 366, 389.

Since a reasonable cross-examination has been held essential to a fair hearing, a total denial of cross-examination or its equivalent is, we submit, a denial of due process of law. *The court renders a full-fledged judgment without ever having accorded a full-fledged trial.* This is an important question in view of the spread of the summary judgment procedure, and has not been heretofore decided.

(5) We have already pointed out that the question whether there is a property right (or a contractual obligation) is itself a federal question. The seriousness and substantiality of this question in these cases is evident from the fact that the state courts have decided both ways on the same question in the same case. In the first appeal of *Bennett v. Hibernia Bank,* 47 Cal. (2d) 540, 551-2, the Supreme Court of California said: "Hibernia was organized as a business and profit-making organization, and the members had property rights in the assets of the corporation."

On the second appeal of *Bennett v. Hibernia Bank,* 186 A.C.A. 815, 821, the District Court of Appeal said: "Similarly, the argument that appellants' property rights have been taken without due process of law assumes the existence of such property rights. We

have pointed out *supra* and in *Spencer* [the case at bar] that appellants have failed to establish such property rights."

Cf. *Gelpcke v. Dubuque*, 68 U.S. 175, 206, 17 L. Ed. 520.

The District Court of Appeal has applied the statutes of 1862 and 1864 retroactively to destroy preexisting contractual rights. No claim of public benefit is made; the statutes as construed wipe out preexisting private rights in precisely the way that the constitution forbids.

Likewise the rendition of judgment under the summary judgment statute without any opportunity whatever for cross-examination denies what heretofore has always been held an essential to a fair hearing.

We submit both of these constitutional objections to California statutes are of sufficient merit to call for a full consideration, if not for a summary reversal.

Dated, June 22, 1961.

Respectfully submitted,

M. MITCHELL BOURQUIN,
GEORGE OLSHAUSEN,
Attorneys for Appellants.

(Appendices A, B and C Follow.)

Appendix A

(Vol. 186 A.C.A. 770.)

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil Nos. 19,193, 19,194, 19,195

ALICE MASTEN SPENCER, as Administratrix, etc., *Plaintiff and Appellant* vs. THE HIBERNIA BANK, a corporation, et al., *Defendants and Respondents.*	1 Civil No. 19,193
ALICE MASTEN SPENCER, et al., *Plaintiffs and Appellants,* vs. THE HIBERNIA BANK, a corporation, et al., *Defendants and Respondents.*	1 Civil No. 19,194
MARIAN MEL, as Special Administratrix of the Estate of John Mel, Deceased, *Plaintiff and Appellant,* vs. THE HIBERNIA BANK, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF RICHARD M. TOBIN, DECEASED, FLORENCE ADELE TOBIN, JOSEPH O. TOBIN, EDWARD J. TOBIN, CYRIL R. TOBIN, CONSTANCE DE YOUNG TOBIN, BEATRICE TOBIN RAOUL-DUVAL, RUTH HAWKINS TOBIN, ABBY PARROTT TOBIN, CELIA TOBIN CLARK, RICHARD RAOUL-DUVAL, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF CHARLES J. BARRY, DECEASED, ERNEST O. MCCORMICK, JR., LEO O'GRADY, SHELDON G. COOPER, JOSEPH O. TOBIN, TRUSTEE, CYRIL R. TOBIN, TRUSTEE, RICHARD RAOUL-DUVAL, TRUSTEE, ERNEST O. MCCORMICK, JR., TRUSTEE, SHELDON G. COOPER, TRUSTEE, DOES ONE TO FIFTEEN, *Defendants and Respondents.*	1 Civil No. 19,195

OPINION

If, as Judge Jerome Frank has written, each case is but an excursion into history,[1] we must view the

[1] "Thus the trial court acts as an historian, its job being much the same as the historian's. The historian, too, tries to reconstruct

litigation in its historical setting and in the context of the times in which it originated. Within those limitations we have examined the unique structure of the first Hibernia corporation of 1859 and the subsequent corporation of 1864 to determine if, in the posture of the instant cases, appellants establish valid claims to ownership of assets here. The task has necessarily been made more difficult by the long lapse of time since the origin of the alleged rights. Our inquiry convinces us that in substance appellants' contentions succumb to the lack of depositorship of their predecessors in the 1859 and 1864 institutions and, in any event, to the nondescendibility of any alleged rights of such predecessors.

Appellants in these three declaratory relief actions seek as successors in interest of N. K. Masten and John Mel a determination of claimed rights in The Hibernia Bank. The trial court granted respondents' motions for summary judgments and appellants have appealed from the ensuing judgments.

This appeal presents five issues for our determination:[2] (1) the applicability of a summary judgment in a declaratory relief action; (2) the alleged presence of factual issues; (3) the effect of respondents' affidavits upon the first count of the second amended

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the past, but usually he relies on second hand or third-or-fourth-hand reports of dead witnesses. Indeed, the historian has been called a judge of the dead." (Jerome Frank, Courts on Trial, p. 37.)

[2]A sixth issue, whether appellants are barred by the in rem judgment in 1946 which purported to determine the members of The Hibernia Savings and Loan Society, we do not discuss since our determination of the other issues renders this question moot.

complaint; (4) the rights of appellants' predecessors in the 1859 Hibernia corporation and the 1864 Hibernia corporation in the absence of depositorship; and (5) the descendibility of the rights of appellants' predecessors.

The principles which apply to the summary judgment procedure are well settled. In considering such a motion the trial court merely ascertains the presence or absence of factual issues (*Walsh v. Walsh* (1941), 18 Cal.2d 439, 441 [116 P.2d 62]); it does not decide the nature or the truth of the facts themselves. (*California Lettuce Growers v. Union Sugar Co.* (1955), 45 Cal.2d 474, 488 [289 P.2d 785, 49 A.L.R.2d 496].) If no triable issues of fact exist and the movant's affidavits would sustain a judgment in his favor, the court will grant the motion. (*Desny v. Wilder* (1956), 46 Cal.2d 715, 725-726 [299 P.2d 257]; *Coyne v. Krompels* (1950), 36 Cal.2d 257, 260-261 [223 P.2d 244].) However, since this determination must be based upon affidavits without the benefit of cross-examination or trial by jury, the affidavits of the moving party are strictly interpreted while those of the opponent are liberally construed; in this respect the opponent's affidavits need not be composed wholly of evidentiary facts. (*Eagle Oil & Refining Co. v. Prentice* (1942), 19 Cal.2d 553, 556 [122 P.2d 264].) "In other words, the affidavits are to be construed with all intendments in favor of the party opposing the motion . . . ." (*Desny v. Wilder, supra*, 46 Cal.2d 715, 726.)

Applying these rules, we present a summarization of the basic history of The Hibernia Bank, beginning

with the formation of a singular corporation that, although structured as a capital stock corporation, was in essence a mutual savings bank, and the subsequent change to a membership corporation. We discuss other facts involving other issues when we analyze the materiality of those issues.

On February 2, 1859, a "few Irish gentlemen" met in San Francisco "for the purpose of taking into consideration the necessity of immediately organizing 'a Savings Bank' chiefly for the benefit of our own people...." Subsequent to the election of a chairman, and in response to his request, William MacCann explained the objectives of the meeting; in so doing he "urged the necessity of adopting some plan by which the thousands of Irish, residing in this country might have some secure place of deposit for their savings ...." At this meeting eight "Provisional Trustees" were appointed and it was resolved: "[T]he signing of the Preamble[3] to the constitution and the payment of five dollars, shall be the terms of membership, and such shall have a vote until the society shall be fully organized", and, Mr. R. Tobin shall record the exist-

[3] "We, the undersigned being desirous of forming a Society by means of which its members may be enabled to find a secure and profitable investment for small savings, and from which they may have an opportunity to obtain the use of a moderate capital on giving good and sufficient security for the repayment of the same with interest, etc. whether such capital is to be used in the prosecution of commercial business, in purchasing a homestead or for other lawful purposes, do, each for himself covenant promise and agree to and with all the other subscribers hereto, that a constitution shall be drawn up for our government and which shall determine our mutual duties, rights and privileges as members of such Society.

[Signatures omitted]"

ence of the society in conformity with the laws of the state.

On the 3d and 8th of March, 1859 John Mel and N. K. Masten, respectively, signed the preamble and paid the $5.00. At a meeting on March 24, 1859 "Mr. Masten introduced for discussion the need of having the Society duly *incorporated* in conformity with the laws of the State" and the body appointed a committee for that purpose.

The founders of The Hibernia Savings and Loan Society incorporated it under an 1853 act (Stats. 1853, p. 87); they executed its certificate of incorporation on the 31st of March and filed it with the county clerk on April 12, 1859. The certificate of incorporation provided that the "Capital Stock shall be Six Hundred Thousand Dollars, and the number of shares of which said stock shall consist, shall be Six Thousand . . . ." This corporation, hereinafter denominated "Hibernia of 1859," adopted by-laws; pursuant to the preamble, the undersigned, among whom were N. K. Masten and John Mel, agreed that these by-laws "shall govern us, and determine our mutual duties, rights and privileges, as members of such Society."

Article 5 of these by-laws recited "Those who shall sign these By-Laws . . . and pay the entrance fee of two dollars, shall be styled and considered members of this Corporation. Those, who, in addition to the above, shall hold one or more shares of its Stock shall further be styled and considered Stockholders . . . . The entrance fee will in no case be repaid or credited back, but shall be considered part of the sinking fund

. . . ." Article 21 further provided that "[m]embers shall be at liberty to make deposits in sums of not less than two and one-half dollars," and article 24 recited "All deposits withdrawn at any time before the declaration of the dividend for the current half year, shall be entitled to interest at the rate of one-half of one per cent, per month . . . ." The by-laws concluded with article 38: "[N]o alteration of any of . . . these By-Laws shall be made, except by a vote of three-fourths of all the shares which may be represented at the meeting of the Society at which it may be voted upon . . . ."

The incorporators of Hibernia of 1859 planned that the members were to compose the owners, proprietors, and constituents of the corporation. No dividends were ever declared or paid upon the outstanding stock of this corporation; rather, all dividends were paid to the members upon their deposits. Though incorporated as a stock corporation, Hibernia of 1859 issued stock only during the period June 14, 1859, to November 29, 1861, and by June 27, 1863, all but four certificates, whose whereabouts were unknown, had been retired and cancelled. Thereafter, the corporation consisted of members only. And, although only twenty persons signed this Hibernia certificate of incorporation, some 5,479 persons by August 29, 1864, became members of this Hibernia.

Both Masten and apparently Mel paid the two-dollar entrance fee, signed the by-laws, and made deposits in Hibernia of 1859. Masten withdrew his original deposit, making subsequent deposits and withdrawals

from time to time thereafter, but on July 27, 1864, he withdrew his entire balance, closed his account and never again became a depositor. By December 1, 1861, Mel withdrew his deposit and likewise never again became a depositor.

On August 29, 1864, the board of trustees in accordance with the membership's authorization, elected to incorporate under "An Act to provide for the Formation of Corporations for the Accumulation and Investment of Funds and Savings." (Stats. 1862, p. 199, as amended by Stats. 1864, p. 531.) And on August 30, 1864, they filed a new certificate of incorporation, which, pursuant to section 2 of the act, limited the corporate existence to 50 years. The act permitted all savings and loan societies, claiming in good faith to be incorporated under the laws of this state, to incorporate as savings banks without capital stock; it further provided that the corporate powers be exercised by a board of directors. Among other corporate powers the act included the authority "To make by-laws . . . for the organization of the company . . . the regulation of its affairs . . . and the time and manner in which any person may become, or may cease to be, a member of the corporation . . . ." (Stats. 1862, p. 200.)

The certificate of this Hibernia Savings and Loan Society, hereinafter called "Hibernia of 1864," provided for a non-stock membership corporation. Hibernia of 1864 acquired all the deposits and properties of the 1859 corporation including the two-dollar entrance fees. Hibernia of 1864 operated under the 1859 by-

laws until September 29, 1864, when the board of directors, without any vote by the membership, repealed the prior by-laws, and adopted new by-laws.

These new by-laws provided: "Art. 4th. All persons who were members of The Hibernia Savings and Loan Society on the twenty-ninth day of August, 1864,[4] shall be deemed and considered members of this corporation, and the signature of such persons to an agreement on their part to become members of this corporation, and ratifying and confirming the incorporation of said The Hibernia Savings and Loan Society, as directed by a resolution of its Board of Trustees, adopted August 8th, 1864, shall be procured as speedily as may be . . . . Other persons may be allowed to become members of this corporation by a vote of the Board of Directors, and not otherwise. Membership shall not pass with the ownership of moneys deposited with or under control of the corporation . . . . Article 15th . . . . Each depositor and new member shall pay an entrance fee of $2. which can never be claimed. All Entrance Fees shall go to the credit of the Reserve Fund."

Neither John Mel nor N. K. Masten ever became depositors of Hibernia of 1864; neither ever were voted members of this Hibernia by its board of directors; neither signed the "Agreement to Become Members." John Mel and N. K. Masten died in 1892 and 1901, respectively.

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[4]Respondents' version of this by-law is identical, except that August 31, 1864, is alleged rather than August 29; the difference is immaterial in the instant disputes.

On March 20, 1865, the board of trustees adopted the following by-law: "[A]ll members of this corporation whose accounts have heretofore been closed, shall be allowed to deposit hereafter only upon the same terms and conditions as depositors who were never members of this corporation."

In January, 1909, Hibernia of 1864 filed certain documents which purported to extend its corporate existence for another 50 years; and, in March 1934, Hibernia filed other documents purportedly providing for its perpetual existence under section 362e of the Civil Code. None of the appellants nor their predecessors executed any of these documents.

In 1947 Hibernia reorganized as a stock corporation under the name of The Hibernia Bank. The reserve fund of some $7,000,000, which had accumulated since Hibernia's 1859 incorporation, became the basis for a stock issuance to the individual respondents in the present case. (*Bennett v. Hibernia Bank* (1956), 47 Cal.2d 540 [305 P.2d 20].)

The trial court granted respondents' motions for summary judgments. Subsequent to the recitation "the Court does hereby DECLARE the rights of the parties," the judgments provide: None of the plaintiffs have any interest in The Hibernia Bank, its assets or capital stock; N. K. Masten ceased to be a depositor of Hibernia in July, 1864; he was never thereafter a depositor, and was not a member thereof on August 29, 1864, or August 31, 1864; nor did Masten ever become a member of Hibernia of 1864. John Mel ceased to be a depositor of Hibernia in 1861, was not a de-

positor subsequently, and was not a member thereof on August 29, 1864, or August 31, 1864; nor did he become a member of Hibernia of 1864. Membership in both Hibernia of 1859 and 1864 was not transferable or descendible and therefore any interest which Masten or Mel may have had terminated with their death. No person acquired any rights or interest in The Hibernia Bank by virtue of having been an incorporator of Hibernia of 1859, or by having been a party to the pre-incorporation agreement entitled "Preamble."

We consider the subjects presented by appellants' allegations of error in the order listed.

1. *The applicability of a summary judgment in a declaratory relief action.*

Appellants' contention that the summary judgment procedure of section 437c (Code Civ. Proc.) does not apply to declaratory relief actions (Code Civ. Proc., § 1060) collapses when exposed to the rationale of that section and the form of the instant judgments.

Section 437c undertakes the expedition of litigation by the elimination of needless trials (*Cone v. Union Oil Co.* (1954), 129 Cal.App.2d 558, 562 [277 P.2d 464]; *Estate of Kelly* (1960), *178 Cal.App.2d 24, 28 [2 Cal.Rptr. 634]). It expressly applies to "all types of proceedings"; this section obviously "was intended to include declaratory relief actions in a proper case." (*Walker v. Munro* (1960), †178 Cal.App.2d 67, 70 [2 Cal.Rptr. 737].) The propriety of the application of

*Advance Report Citation: 178 A.C.A. 23, 27.
†Advance Report Citation: 178 A.C.A. 66, 69.

declaratory relief lies in the trial court's function to render such a judgment when only legal issues are presented for its determination. (*Bank of America etc. Assn. v. Casady* (1936), 15 Cal.App.2d 163, 168 [59 P.2d 444]; *Enos v. Foster* (1957), 155 Cal.App.2d 152, 157 [317 P.2d 670]; *Doyle v. Hibernia Bank* (1957), 156 Cal.App.2d 16, 20 [319 P.2d 412].)

The judgments in the instant cases comport with the requirement of *Essick v. City of Los Angeles* (1950), 34 Cal.2d 614, 624-625 [213 P.2d 492], that, in a declaratory relief action, the court should decree that "plaintiffs are not entitled to the declarations in their favor" rather than enter a judgment of dismissal. (P. 624.) Appellants' claim, therefore, that the application of section 437c to declaratory relief actions is tantamount to a repeal of this latter section, because it prevents a declaration of the parties' rights, cannot stand.

2. *The alleged presence of factual issues.*

Appellants assert the existence of two triable factual issues: the first, as to an alleged partnership of Masten, Mel, and others; the second, as to an alleged discriminatory descendibility of membership to those of the Tobin family. With respect to the first, appellants submit that a factual dispute arises from their contention, on the one hand, that, prior to the 1859 incorporation,[5] Masten, Mel and eighteen other persons

[5] "[O]n . . . February 2, 1859 . . . Masten . . . Mel . . . [and others] agreed orally, . . . and on or about February 10, 1859, said persons . . . in writing . . . agreed that they should be associated . . . as equal partners to conduct a banking business . . .

formed a partnership and respondents' position, on the other hand, that these parties engaged in only preincorporation organizational meetings. But the proposed triable, factual issue must be material (*Pianka v. State of California* (1956), 46 Cal.2d 208, 212 [293 P. 2d 458]; here, appellants' contention does not proffer a material issue.

Appellants' asserted partnership rights, even if established as factual, cannot survive the general proposition that "[u]pon the incorporation of a partnership and its merger in the corporate entity, the partners cease to be such, and have only the rights, duties and obligations of stockholders," (8 Fletcher, Cyc. of Corps., § 4018, p. 417), or, when a partnership is merged in a nonstock corporation, they acquire the rights, duties and obligations incident to membership in the particular type of organization involved. In the instant case appellants assert that Masten, Mel and eighteen other persons "became and continued to be, until April 12, 1859, the date of incorporation . . . equal partners in the banking business. . . . That on . . . said 12th day of April 1859, said partners executed the certificate of incorporation . . . and incorporated said banking business . . . adopted a code of by-laws and rules of order, and covenanted, promised and agreed that said by-laws and rules of order . . . should determine their mutual duties, rights and privileges as members of said corporation: . . . that

and . . . each of said persons then and there became and continued to be, until April 12, 1859, the date of incorporation, . . . equal partners . . .; that said persons . . . conducted a banking business as equal partners until April 12, 1859."

each of said [former] partners . . . became a member of said corporation . . . ." Thus, appellants admit that their alleged rights depend upon their predecessors' status as members of Hibernia of 1859; accordingly, the existence of any preincorporation partnership becomes immaterial.

Appellants' cases do not compel a contrary conclusion: *Chater v. San Francisco Sugar Refining Co.* (1861), 19 Cal. 219, 246-247; *Shorb v. Beaudry* (1880), 56 Cal. 446, 450; *Hunt v. Davis* (1901), 135 Cal. 31, 34 [66 P. 957]; and *Baldwin v. Miller & Lux* (1907), 152 Cal. 454, 457 [92 P. 1030], involved preincorporation agreements among all those parties who were to comprise the corporation, and who, upon the formation of the corporation pursuant to the agreements, either technically or in essence were to become the stockholders. Ruling on such facts, the courts in each of these cases effectuated the preincorporation contract upon the theory that the corporation, essentially a trustee, served as a mere agent to execute the terms of the contract. But appellants' predecessors here signed by-laws which were to "determine their duties, rights and privileges"; the corporation served not as the executor of old rights but as the source of new relationships.

Nor is *Elsbach v. Mulligan* (1943), 58 Cal.App.2d 354 [136 P.2d 651], in point. In that case the plaintiff and defendant were the equal, and only, stockholders of a corporation which the trial court, upon sufficient evidence, found to have been organized by the parties to continue their joint venture. In allowing the plain-

tiff to recover individually for wrongs done by the defendant to the corporation, this court stated: "Appellant contends that an individual stockholder has no . . . legal right to sue upon wrongs done the corporation. This argument is based primarily upon the contention that since plaintiff participated in the formation of the corporation he may not now proceed in disregard of the corporate entity, since when a corporation supersedes a partnership . . . rights subsequently accruing to the partners . . . are not based on that relationship. *The soundness of the contention generally may be admitted but there are exceptions to the general rule.* If a corporation or a formal partnership is a mere agency for the purpose of convenience in carrying out a joint venture agreement, and independent and innocent third parties such as creditors or stockholders, are not injured thereby . . . justice would seem to demand that in determining the rights of the parties they be placed in the position each occupied under the original agreement." (Pp. 368-369; emphasis added.)

Strong v. Los Nietos etc. Assn. (1902), 137 Cal. 607 [70 P. 734], likewise does not meet the issue. In that case the directors and all but four of the plaintiffs of an unincorporated association attempted to dissolve the association by forming a corporation which took over all the property of the association. The four old, as well as the four new, members of the old association, sued for a return of all the property upon the theory that the other persons had withdrawn from the association. The trial court gave judgment for

defendants. In affirming the denial of the motion for new trial, no appeal being taken from the judgment, the Supreme Court stated that "If plaintiffs were to get what they are asking for, . . . the defendants would have no further interest or property in the old association, and would be entirely excluded therefrom." (P. 609.) The court affirmed the trial court's finding that the members did not withdraw from the association by reason of the incorporation; "If they are still members of the old association, whether it be a firm, partnership, or just a plain joint association, they cannot be deprived of their rights in the property thereof." (P. 610.) In the instant case appellants' own assertions reveal no retention of rights in the partnership, but discontinuance of the partnership beyond April 12, 1859, and agreement by the "former partners" to become members of, and to be governed by, the by-laws of the corporation.

We conclude that appellants' first proposed triable issue of fact founders on the rock of materiality.

Appellants' second contention as to a triable issue of fact, premised upon the charge that membership was permitted in discriminatory fashion to descend to members of the Tobin family, fails in the absence of any showing of fact to sustain it.

Although section 437c requires that the affidavits set forth allegations of fact, appellants' affidavit and interrogatory, instead, disclose an absence of facts proffered by appellants. The affidavit states: "One of the issues which plaintiffs . . . *intend* to present, is the issue that subsequent provisions purporting to

make membership non-descendable do not constitute the actual contract among the parties but that membership has always in fact been treated as descendable and memberships have in fact descended from generation to generation within the Tobin family and provisions for alleged non-descendability have been applied occasionally and only to eliminate descendants of members who did not belong to the Tobin family. The additional interrogatory posed calls for evidence upon this issue." While respondents answered the first part of the interrogatory relating to "the names of all the members of Hibernia . . . from August 29, 1864 to the present time," they did not respond to the following query: "[S]tate the relation by blood and/or marriage of each of said members to one another." Appellants took no action in the trial court to obtain this information.

The affidavit discloses that the affiant does not know the facts therein alleged; it states that affiant *intends* to present the stated issue. Such assertion of a future issue or proof has been characterized by *Nini v. Calberg* (1960), *183 Cal.App.2d. ....., ... — ..... [7 Cal. Rptr. 146]: "The affidavit . . . merely states that during the trial it *may* be established that the instructions given by defendant *may* prove to be more detailed than as stated by defendant. If such a statement causes to arise an issuable question of fact, then there never could be a summary judgment granted, for all a defendant would have to do when confronted by a motion for summary judgment would be to state

*Advance Report Citation: 183 A.C.A. 694, 698-699.

in his counteraffidavit that at the trial facts might be produced which might contradict the definite statement of facts in the moving party's affidavit."

In this respect appellants assert that the trial court's refusal to receive into evidence, or even mark for identification, Hibernia's records for the past one hundred years invokes the rule that if evidence has been wrongfully excluded it must be presumed to be favorable to the offering party. Appellants' strongest citation on this point, *Zainudin v. Meizel* (1953), 119 Cal.App.2d 265, 270 [259 P.2d 460], states "that when a party has prevented proof of a fact by his *erroneous* objection and an *erroneous* ruling of the trial court, he will not be permitted to take advantage of his own wrong in the reviewing court but the latter court will assume that the fact was duly proved." (Emphasis added.)

In our case, respondents, not erroneously, but properly, objected to the introduction of all of their records, and the trial court correctly, not erroneously, excluded them. While a party opposing a motion for summary judgment, may, to obtain desired documents, utilize a subpoena duces tecum premised on an affidavit purporting to summarize documents within the movant's possession (*Whaley v. Fowler* (1957), 152 Cal.App.2d 379, 382-383 [313 P.2d 97];[8] *Schessler v. Keck* (1956), 138 Cal.App.2d 663, 669-670 [292 P.2d

[8] "The affidavit of plaintiff's attorney states . . . that he has studied the hospital records and charts of . . . defendant hospital . . .; that an infection developed in plaintiff's left leg while he was a patient at the hospital; that said infection was uncontrolled; that the facts established by the hospital records and Fowler deposi-

314]; Code Civ. Proc., § 1938), he may not use a subpoena duces tecum to adduce all of the movant's records regardless of their materiality. The provision of section 1985 of the Code of Civil Procedure, stating: "The process by which the attendance of a witness is required . . . may also require him to bring with him any books, documents, or other things under his control which he is bound by law to produce in evidence" has been interpreted to require the additional showing that the matters sought would be competent evidence and admissible at the trial. (Witkin, California Evidence, § 543, p. 591.)

Appellants' twofold argument that the records constituted competent evidence does not accord with rules of procedure germane to this kind of action. Appellants first contend that upon a hearing of a motion for summary judgment an affiant may be called as a witness and questioned as to the basis of his averments in the manner appellants attempted to follow in the instant case. On oral argument appellants asserted that "Cross-examination is one form of raising an issue of fact." Section 437c indicates, however, that the hearing is to be premised upon affidavits; not only has the calling of a witness upon such a hearing been characterized as "contrary to normal procedure," (*Gardner v. Shreve* (1949), 89 Cal. App.2d 804, 809 [202 P.2d 322]), but also in *Eagle Oil & Refining Co.*

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tion disclose that the hospital is jointly negligent with defendant Fowler.

"Obviously, this affidavit states no facts, merely hearsay and conclusions of law. Neither the hospital records nor the deposition of defendant Fowler was before the court. Said affidavit is of no value in determining whether there were issuable questions of ***fact*** . . . ."

v. Prentice, *supra*, 19 Cal.2d 553, 556, the Supreme Court stated: "Because the procedure is summary and presented on affidavits *without* the benefit of cross-examination, a trial by jury and opportunity to observe the demeanor of witnesses . . . the affidavits [of the opponent] should be liberally construed. . . ." (Emphasis added.)

Appellants' second ground rests on the theory that the opponent of a motion for summary judgment may introduce any and all of the movant's records whenever it appears that *some* record *might* contain *some* evidence favorable to the opponent; they state: "Documents *in the possession of the opponents* are analogous to the examination of a party opponent under C.C.P. 2055. The Supreme Court has said that such an examination is exploratory, and the examiner *need not be able to say what he expects to produce.*" As we have pointed out, the decisions sanction no such procedure. That the proceeding is a summary one does not warrant the adduction of a mass of documentary evidence embracing the material and data unknown even to the offering counsel.

The evidence was, therefore, not admissible and respondents did properly object to its introduction. Though initially a party may move to quash a defective subpoena duces tecum, he may also comply with it, and, when the evidence is produced in court, object to its admissibility. (Witkin, California Evidence, § 555, p. 603; *Southern Pacific Co. v. Superior Court* (1940), 15 Cal.2d 206, 209-210 [100 P.2d 302, 130 A.L.R. 323].) In the instant case respondents' ob-

jection, although not couched in formal language, related to the introduction of *all* of their records: "Then there is a humdinger. . . . That is all the records of the bank from 1859, one hundred years of records." As the court said in *Oxford Paper Co. v. United States* (1932), 56 Fed.2d 895, 896, "the practice of dumping upon the court a large number of documents or instruments in which very little is even claimed to be material or competent, without any statement as to the part thereof which it is claimed should be received in evidence, is disapproved, and marking a collection of different instruments as an exhibit to be used in this manner merely leads to the confusion which exists in the case. . . ."

The second triable issue of fact does not then materialize because it does not stand upon proffered proof of fact.

3. *The effect of respondents' affidavits upon the first count of the second amended complaint.*

Appellants vainly claim that the first count of the second amended complaint is not defeated by respondents' affidavits. First, as previously indicated, the partnership allegation of that count is immaterial. Second, this count fails in the void of its silence upon any reorganization of Hibernia subsequent to the 1859 incorporation; appellants themselves assert the 1864 incorporation was undertaken pursuant to the members' authorization and certain acts of the Legislature. (*Castleman v. Wright* (1948), 334 Ill.App.2d 74 [78 N.E.2d 341], ("motion for summary judgment was properly denied, where affidavits in support of

motion set out several mutually contradictory statements of alleged facts").) Indeed, appellants' briefs offer no argument based upon this second point.

4. *The rights of appellants' predecessors in the 1859 Hibernia corporation and in the 1864 Hibernia corporation in the absence of depositorship.*

The first major substantive question before us turns on whether Mel and Masten could obtain membership in Hibernia of 1864 in the absence of any deposit in the bank on August 29, 1864. As we have pointed out, Masten withdrew his entire balance on July 27, 1864, and Mel withdrew his deposit by December 1, 1861. As of the 29th day of August, 1864, neither were depositors. Article 4 of the by-laws of 1864 provided that "[a]ll persons who were members of The Hibernia Savings and Loan Society on the twenty-ninth day of August, 1864, shall be deemed and considered members of this corporation. . . ." Since the by-laws specify that membership must have existed as of the 29th day of August, 1864, our question narrows to whether Masten and Mel can be regarded as members on that day despite their lack of depositorship. We must determine the validity of the trial court's ruling that membership depended upon such depositorship.

Since appellants consistently assert that Hibernia of 1859 constituted a mutual savings bank,[7] we ex-

[7]"Members" is "a generic term including everyone having an interest in the corporation, according to the law of mutual savings banks. . . ."

Respondents concede that Masten and Mel were members respectively until July 27, 1864, and December 1861.

amine *seriatim* the relationship of deposit to membership in such a bank, the applicability of our ruling in *Doyle v. Hibernia Bank*, supra, 156 Cal.App.2d 16, and the contentions of appellants.

Savings banks originated in Great Britain as philanthropic institutions designed for the encouragement of savings by the working class (Horne, A History of Savings Banks (1947), pp. 1-70; 13 Holdsworth, History of English Law (1952), pp. 333-335; 2 Keyes, History of Savings Banks in the U. S. (1878), pp. 519-524), and were the progenitors of many similar institutions that later developed in the United States. (2 Keyes, History of Savings Banks in the U. S., *supra*, pp. 519-524; Kniffin, The Savings Bank and Its Practical Work (1928), pp. 5-19, 123-131.)

The legislative history of the mutual savings banks of England and Ireland indicates that depositorship in the bank was prerequisite to membership and that upon withdrawal of the deposit the member was entitled to no more than its return, plus interest. In its first regulation of these banks, Parliament, enacting two almost identical statutes (57 Geo. III, ch. 105, 57 Stats. at Large, p. 395 (Ireland); 57 Geo. III, ch. 130, 57 Stats. at Large, p. 495 (England)) provided that the trustees or managers of such a bank were to derive no benefit from deposits, but that the "Persons depositing Money therein shall have the sole Benefit of such Deposits and the Produce thereof. . . ." (57 Geo. III, ch. 105, §III, 57 Stats. at Large, p. 396; 57 Geo. III, ch. 130, §III, 57 Stats. at Large, p. 496.) Although silent in regard to any surplus fund of the sav-

ings banks, these statutes provided that in the event of the depositor's death, the bank should pay to his heirs or estate no more than the deposit with "any Dividends or Interest due thereon."[8]

Parliament's enactment on July 28, 1828 of "An Act to consolidate and amend the Laws relating to Savings Banks" (9 Geo. IV, ch. 92, 68 Stats. at Large, p. 585) more clearly discloses that depositorship is the essence of membership in a mutual or trustee savings bank; that the depositor who withdraws his money is entitled only to the return of the deposit, plus interest or dividend, which includes no part of the bank's surplus. Of necessity the withdrawal involves a surrender of any interest in such surplus. The statute repealed prior laws relating to savings banks and consolidated in its provisions as one act the laws applicable to savings banks in both England and Ireland.

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[8] 57 Geo. III, ch. 105, §§ XXV and XXVI, and 57 Geo. III, ch. 130, §§ XXIII and XXIV are almost identical; the latter two sections provide: Section XXIII. "[I]n case any Depositor . . . shall die, leaving any Sum or Sums of Money in the said Funds, or any Dividends or Interest due thereon, belonging to him or her at the time of . . Death, exceeding . . . Twenty Pounds, the same shall . . . be paid . . . upon Probate of the Will of the deceased Depositor, or Letters of Administration of his or her Estate and Effects. . . ."

Section XXIV. If "any Depositor in the Funds of any such Institution shall die, leaving a Sum of Money in the said Fund, which, with the Interest thereon, shall not exceed . . . Twenty Pounds, . . . the Trustees or Managers . . are . . . required, if no Will shall be proved, or no Letters of Administration shall be taken out, . . . to pay the same according to the Rules and Regulations of the said Institution . . .; and in the Event of there being no Rules and Regulations . . . among the . . . Persons entitled . . . according to the Statute of Distributions." (57 Geo. III, ch. 130, 57 Stats. at Large, p. 503.)

This 1828 statute was enacted for the benefit of societies in *England and Ireland* "maintaining any Institution in the Nature of a Bank to receive Deposits of Money *for the Benefit of the Persons depositing the same,* to accumulate the Produce or so much thereof as shall not be required by the Depositors, their Executors or Administrators . . . and to return the Whole or any Part of such Deposit and the Produce thereof to the Depositors, their Executors or Administrators (deducting out of such Produce so much as shall be required for the necessary Expenses attending the Management of such Institution) but [the persons forming such society] deriving no Benefit whatsoever from any such Deposit or the Produce thereof . . ." (9 Geo. IV, ch. 92, 68 Stats. at Large, p. 585; emphasis added.) This statute provided that the bank's trustees were to invest the monies received "in the Bank of *England* or the Bank of *Ireland,* as the Case may require, in the Names of the Commissioners for the Reduction of the National Debt" (9 Geo. IV, ch. 92, 68 Stats. at Large, p. 590), and that these commissioners were also to hold the surplus fund of the bank.[9] The statute also provided that in the

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[9] "XXII . . . in all Cases where the Joint Stock or Property of any Savings Bank . . . shall . . . be increased by the Interest received beyond the Rate of Interest payable to the Depositors . . . the said Trustees or Managers, after deducting all such Expenses as they may deem proper, shall, within Six Months after the Twentieth Day of *November* in each Year, ascertain, certify, and pay over to the said Commissioners the Amount of such increased Stock and Property, reserving such Portion as may appear necessary to meet current Expences; and the Amount of such Surplus . . . [may be] . . . claim[ed] and receive[d] of and from the said Commissioners . . . for the Purposes of the Institution . . ." (9 Geo. IV, ch. 92, 68 Stats. at Large, p. 596.)

event of a depositor's death the depositor's estate or heirs were titled to the deposit plus interest;[10] no provision was made for the estate or heirs to retain any interest in the surplus fund. These sections remained in force through 1859, although the statute was amended in other respects periodically.[11]

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[10] "XL . . . in case any Depositor in the Funds of any Institution . . . shall die, leaving any Sum or Sums of money in the said Funds, or any Dividends or Interest Due thereon, belonging to him or her at the Time of . . Death, exceeding in the whole the Sum of Fifty Pounds, the same shall . . . be paid . . . upon the Probate of the Will . . . or Letters of Administration of his or her Estate and Effects . . ." (9 Geo. IV, ch. 92, 68 Stats. at Large, p. 601.)

"XLI . . . in case any Depositor in the Funds of any such Institution shall die, leaving a Sum of Money in the said Fund, which, with the Interest thereon, shall not exceed in the whole Fifty Pounds, it shall be lawful . . . in case such Trustees or Managers shall be satisfied that no Will was . . . left, . . . and that no Letters of Administration will be taken out . . . to pay the same at any Time after the Decease of such Depositor, according to the Rules and Regulations of the said Institution; and in the Event of there being no Rules and Regulations . . . to pay and divide the same to and amongst the Person or Persons entitled to the Effects of the deceased Intestate, according to the Statute of Distributions." (9 Geo. IV, ch. 92, 68 Stats. at Large, p. 602.)

[11] (1833) 3 & 4 Will. IV, ch. 14, 73 Statutes at Large, page 50, [enabling depositors to purchase government annuities through savings banks]; (1835) 5 & 6 Will., ch. 57, 75 Statutes at Large, page 270, [extending to Scotland the provisions of 9 Geo. IV, ch. 92 and 3 & 4 Will. IV, ch. 14]; (1844) 7 & 8 Vict., ch. 83, 84 Statutes at Large, page 358, [amending the provisions relating to the purchase of government annuities through savings banks]; (1848) 11 & 12 Vict., ch. 133, 88 Statutes at Large, page 886, [amending 7 & 8 Vict., ch. 83]; (1850) 13 & 14 Vict., ch. 110, 90 Statutes at Large, page 793, [continuing in force 11 & 12 Vict., ch. 133]; (1852) 15 & 16 Vict., ch. 60, 92 Statutes at Large, page 216, [continuing 11 & 12 Vict., ch. 133]; (1853) 16 & 17 Vict., ch. 45, 93 Statutes at Large, page 224, [consolidating and amending the laws relating to purchase of government annuities through savings banks]; (1854) 17 & 18 Vict., ch. 50, 94 Statutes at Large, page 181, [amending and continuing 11 & 12 Vict., ch. 133]; (1859) 22 & 23 Vict., ch. 53, 99 Statutes at Large, page 153, [allowing charitable societies to invest all their monies in savings banks].

We believe that it is apparent from the provisions of this act that withdrawal of the deposit effectuated a surrender of any interest of the deposition in the surplus fund. Our conclusion finds corroboration in the purpose for which these banks were founded, the dependence of such an institution for its very life upon monies being deposited in it, and the provisions for payment to the heirs or estate of a deceased depositor of only the decedent's deposit and interest. The descendants of the depositors in one of their early nineteenth century savings banks obviously would not have been entitled to participate in a division of the surplus fund. Even assuming that such descendants could have been ascertained, the determination of the portion of the surplus attributable to the ancestor's deposit would certainly have compelled a procedure of prohibitive cost. Indeed, we have been able to find no English decisions on this point; the lack of litigation on the issue indicates that depositors in English and Irish savings banks did not contemplate that their interests in the surplus survived the withdrawal of their deposits.

The early decisions in the United States accord with this conclusion. In the United States the courts have consistently recognized that any interest in the assets of a mutual savings bank is contingent upon depositorship. (*Cogswell v. Rockingham Ten Cents Savings Bank* (1879), 59 N.H. 43, 44;[12a] *Hannon v. Williams*

[12a] [D]epositors in savings-banks stand in the same relation to the assets of the bank as stockholders to banks of discount. . . . They are the owners of the funds of the bank, entitled to share in its profits and liable to bear its losses *pro rata*, and upon the winding up of the business of the bank each *depositor* is entitled

(1881), 34 N.J. Eq. 255, 258-259 [38 Am. Rep. 378];[13] *Lewis v. Lynn Inst. for Savings* (1889), 148 Mass. 235 [19 N.E. 365, 366-367, 12 Am.St.Rep. 535, 1 L.R.A. 785];[14] *Bank Comrs. v. Watertown Savings Bank* (1908), 81 Conn. 261 [70 A. 1038, 1039]; *Huntington v. National Savings Bank* (1877), 96 U.S. 388, 393-395 [24 L.Ed. 777].)[15]

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to his share of the assets or property remaining after the payment of the debts. The depositors are in fact the bank, while the corporation is but an agency for receiving and loaning the money of the depositors." (Emphasis partly added.)

[13]"Savings banks . . . have no capital stock. They are incorporated and organized not for the advantage of the corporators, but solely for the benefit of the depositors. . . . In a savings bank, the depositors bear, in great degree, the same relation to each other and to the property of the bank as do the stockholders in other monetary institutions. To the corporation itself they occupy the double relation of stockholders and creditors."

[14]"At the outset, the chief purpose [of savings banks] was to encourage frugality by affording to persons of small means an opportunity to have their savings cared for by persons of experience, who, by combining the deposits, could make advantageous investments not available for small investors. And this purpose still exists. The corporation had no capital stock. . . . There was no relation of privity between successive depositors, as there is between successive stockholders in an ordinary corporation. No profit or benefit accrued to the managers. . . . *Gradually, with the progress of time, a practice grew up among savings banks . . . of reserving a guaranty fund to meet possible losses; but* the fundamental idea has never been departed from,—that *all the funds and investments of a savings bank are held exclusively for the benefit and security of the depositors.* This idea was and still is the corner-stone of the whole system." (Emphasis added.)

[15]"It is true, the income or interest [from the deposits] is to be divided among the depositors, 'according to the terms of interest stipulated;' implying, perhaps, that the dividend may be less than the interest received by the corporation; but there is nothing in the charter that indicates the excess is for the benefit of the corporators. It is to provide for the necessary expenses of the institution . . . and perhaps to raise a contingent fund to meet possible losses. . . . [U]ntil recently, the primary idea of a savings bank has been, that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary ex-

That membership and membership rights in mutual savings banks terminated when one ceased to be a depositor has been stated by Justice Bray of this court in *Doyle v. Hibernia Bank, supra,* 156 Cal.App. 2d 16: "In England and on the Atlantic Coast in the early days a common form of savings bank was one in which the depositors were the members and only those who were depositors at the time of liquidation of the bank could have any interest in its reserves. *Membership and interest in the bank's assets terminated upon withdrawal of the member's deposits.* (See *Society for Savings v. Bowers* (1955), 349 U.S. 143 [75 S.Ct. 607, 99 L.Ed. 9501].)" (P. 20; emphasis added.) The court proceeds to state: "Plaintiff . . . contends that although the membership ceases the member's right to a proportionate share in the reserves and assets continues on. However, if the member during his lifetime should allow his account to drop below $100 his right to such share did not continue on but ceased with his membership. This very fact shows that a member's right to participate in the reserves and assets depended upon his being a member at the time they were to be distributed, namely, on dissolution of the corporation. He had no right to receive any portion thereof as long as the corporation continued in existence. This was the holding in connection with a similar bank in *Society for Savings v. Bowers* (1955), *supra,* 349 U.S. 143: 'The asserted

penses of conducting the business, inure wholly to the benefit of the depositors, in dividends, or in a reserved surplus for their greater security. Such, very plainly, is the defendant corporation in this case."

interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. *To maintain their intangible ownership interest, they must maintain their deposits.* If a depositor withdraws from the bank, he receives only his deposits and interest . . .'" (Pp. 21-22; emphasis added.)

The soundness of the *Doyle* rulings is confirmed by an appraisal of the bank's function and purpose. Membership without depositorship would be economically anomalous. The founders of Hibernia in 1859 expressed their object to be that "the members thereof may be enabled to find a secure and profitable investment for small savings" and the "opportunity of obtaining from it the use of a moderate capital. . . ." The by-laws indicate that deposits were restricted to members; appellants themselves contend that only members could be depositors. The bank thus depended upon the members for deposits. The foundation of investment and loan lay in the deposit. An academic and sterile "membership," detached from any contributions of deposits to the society could only frustrate its stated purpose. The successful operation of the bank depended upon the members' use of it; such participation in the form of deposits constituted an economic imperative.[16]

[16]In this respect the mutual savings bank's situation did not differ from that of similar economic innovations of the same gen-

The particular dependence of the Hibernia banks upon deposits by the members becomes apparent upon analysis of their structures. As we have pointed out, the 1859 Hibernia could receive deposits only from members; the success of that bank therefore depended upon the participation of members in the form of deposits. While the 1864 corporation did not limit depositors to members, still the bank was structured upon the concept of the member-depositor; and only such persons could elect the directors, each member being entitled to one vote per one hundred dollar deposit. Although deposits could be received from non-members, such deposits could not conceivably have

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eral historical period. Many cooperative marketing associations required by contract that a member market his produce or fruit through the association upon condition that if he failed to do so he pay liquidated damages to the association. In sustaining such a provision the court in *Anaheim U. F. Assn. v. Yeoman* (1921), 51 Cal.App. 759 [197 P. 959], emphasizes that the participation of the member in supplying fruit is vital to the association. "From the nature of the organization and the statement of its purposes as found in its articles and by-laws, it can be fairly and reasonably inferred that by the co-operation of its members, mutual advantages would accrue to all through greater economy in handling and shipping and the securing of more advantageous marketing facilities. These results would be dependent directly upon the performance by the members of their agreement to deliver their fruit into the hands of the association for the purposes declared. . . . *The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market.* A reduction in the amount of fruit so handled would not only tend to increase the overhead cost to the nontransgressing members, but, we may assume, to some extent affect the prestige and standing of the association as a marketing concern." (P. 763; emphasis added.) (See E. G. Nourse, Agricultural Co-operation (1927), p. 282.) Indeed, as the court, in analyzing a stock savings bank, states in *State v. San Francisco Sav. etc. Society* (1924), 66 Cal.App. 53 [225 P. 309], "A savings bank . . . does the bulk of its business on borrowed capital—that is, on the moneys deposited therein by the depositors. . . . *Indeed, without such deposits it could not survive as a savings bank.*" (P. 62; emphasis added.)

been regarded as the sole source for the success of the bank. The members' deposits were surely expected to nourish it. Indeed, if the members' obligation to deposit were not regarded as inherent in their relationship both to the corporation and their fellow members, a stock structure would have better suited the purpose of the 1864 corporation. Significantly, the certificate of incorporation reveals that "the object for which it is formed is that of aggregating the funds and saving of the *members* . . . and of others." (Emphasis added.)

We believe, then, that the nature of the mutual savings bank as set up by the English statutes, as defined by the courts, and as held by *Doyle*, precludes the establishment of rights of membership divorced from depositorship. The very function and purpose of such banks, as well as the nature of the Hibernia corporations, confirms the requirement of depositorship for membership.

We turn to appellants' answering contention that membership survives the withdrawal of the deposit balance[17] because the entrance fee of two dollars kept the membership alive; that Mel and Masten's rights

[17]Appellants' claim of interest in Hibernia's assets is rather vacillating; on the one hand they contend that the "members" are the co-owners of the bank's "business and assets," yet they also state that "the depositors . . . are co-owners of the business. . . ." As we have indicated, the latter statement is the correct one; appellants' citation of *City of Los Angeles v. State Loan etc. Co.* (1895), 109 Cal. 396, 379-402 [42 P. 149], and *State v. San Francisco Sav. etc. Society, supra*, 66 Cal. App. 53, 63-64, corroborates our conclusion. Indeed, these two cases indicate that the membership, which creates an interest in a mutual savings bank, is coextensive with depositorship.

in Hibernia of 1859 carried them into Hibernia of 1864, and that the Bennett case (*Bennett v. Hibernia Bank, supra,* 47 Cal.2d 540), supports this position.

Although appellants equate the entrance fee of two dollars with a deposit, it performed the function which name implied: it was a nonrefundable payment for the privilege of membership; it purchased[18] the membership which we have described, a membership dependent upon and coincident with depositorship. When the member withdrew his deposit his membership ceased. By a subsequent deposit the party could perhaps revive his membership, but during the period of nondeposit he could not be a member. The entrance fee, which was not a deposit, did not affect or enlarge the nature of the membership and did not, as appellants argue, substitute for the deposit.

The payment of the entrance fee did not grant to appellants' predecessors any rights in Hibernia of 1864. On August 30, 1864, Hibernia was incorporated. The members of Hibernia of 1859 as of August 29, 1864, became members of the new corporation. (*Ben-*

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[18]"Another feature of policy which seems to prevail generally, if not universally in California, is the requirement, in institutions having no capital stock, of *an admission or entrance fee of two dollars from each member,* which goes to the formation of a sinking or guarantee fund, corresponding with the surplus fund of eastern institutions. . . . The idea of a fixed contribution to a guarantee or surplus fund, which the depositor thus surrenders absolutely, has this to recommend it, that the institution is at no time sailing under false colors, as is the case where the first deposits are all expended for furniture, fixtures and books, and still the delusive notion is held out that the depositors may, at any time, rightfully demand the return of their deposits in full, regardless of the fact that they have taken forms which render such return impossible." (2 Keyes, History of Savings Banks in the U.S., *supra,* pp. 463-464; emphasis added.)

nett v. Hibernia Bank, supra, 47 Cal. 540, 551.) On August 29, 1864, appellants' predecessors did not have any deposits in the bank. Even if they *could* have had a deposit in Hibernia of 1859 they *had* no such deposit on the crucial day, and they therefore never became members of Hibernia of 1864.

Even if we were to assume, as appellants argue, that the entrance fee gave a "liberty to make deposits" pursuant to article 21 of the by-laws, that is, preserved a right to *re*-deposit in Hibernia of 1859, and that this right extended to Hibernia of 1864, entitling appellants' predecessors to deposit in Hibernia of 1864, such a right could properly be retroactively cut off by subsequent by-laws. Article 4 of the 1864 by-laws, as amended on February 10, 1868, provided that no one should be a member whose account was once closed. As *Bennett v. Hibernia Bank, supra,* 47 Cal.2d 540, states, such a by-law is valid if it would not unreasonably deprive the member of his membership rights. "The reasonableness of the by-law must be considered in the light of all circumstances, including such matters as the purposes for which the corporation was organized and the extent of the rights of the particular member involved." (P. 522.) Since no other extrinsic evidence has been produced, we test the by-laws in the light of this precept and we find nothing unreasonable in the severance of the tenuous and narrow right to redeposit in the new corporation.

In the first place, the severed right was but an insubstantial one, and, as we point out *infra* in our discussion of descendibility, the by-laws may properly

terminate a right which lacks substance. In the second place, the severance was proper in the light of the purposes of the bank. We need not repeat here the many reasons set forth above why deposits by members constituted so vital a consideration to the bank. The member who did not exercise such right to deposit contributed nothing to the bank. A by-law could reasonably sever a right left dormant and unused; it could reasonably eliminate dead-wood inchoate members whose failure to deposit impeded, partially at least, the achievement of the corporate purposes.

In conclusion on this point, we believe that while appellants rely upon *Bennett,* its language as to retroactivity applies directly: "It may be that it was considered necessary to require members to retain their accounts and deposits with Hibernia in order to promote the success of the bank in accordance with the purposes for which it was organized." (*Bennett v. Hibernia Bank, supra,* 47 Cal. 2d 540, 553.)

5. *The descendibility of the rights of appellants' predecessors.*

Assuming Mel and Masten were members of "Hibernia of 1859" on August 29, 1864, and became members of Hibernia of 1864, we must determine if such postulated membership would survive their deaths in 1892 and 1901 respectively. Appellants contend, in substance, that respondents' affidavits fail to defeat appellants' cause of action because the affidavits rely upon the subsequent by-laws of 1864 to sever the descendibility of membership; that if the by-laws be so construed they are void; that the by-laws attempt the

abrogation of property rights in membership; that transferability is an attribute of such property right.

We set out three answers to these contentions: (1) If Mel and Masten became members of Hibernia of 1864 they were bound by the terms of such membership, which carried with it the authorization to the board of directors, pursuant to the act of 1862 to pass the by-laws in question, and these by-laws severed descendibility in view of the decisions in *Bennett* and *Doyle;* (2) the severance of descendibility did not retroactively forfeit any right of Mel and Masten since the nature of Hibernia of 1859 and the 1859 by-laws disclose that that institution conceived of a selected and nondescendible membership; (3) assuming the by-law did work a retroactive effect, *Bennett* sets out the applicable test that the by-law will stand if reasonable in the light of all the circumstances; here the validity of the by-law is sustained under that test.

Turning to the first issue, it is apparent that, since appellants must rely upon their ancestors' memberships in Hibernia of 1864, their position must be tested by the definition of membership in that corporation. If limitation upon descendibility properly inhered in such membership, appellants cannot claim descendibility. The key question turns on the status in the 1864 corporation of a member of the original 1859 corporation and whether such membership carried with it the right of descendibility.

We are concerned for this purpose with the nature of the 1864, not the 1859, structure. Whatever rights

appellants' ancestors may have had in the first corporation, they are not presently material because, as the Supreme Court stated in *Bennett,* "Hibernia thus became a valid membership corporation in August 1864, regardless of what its prior legal status may have been." (*Bennett v. Hibernia Bank, supra,* 47 Cal. 2d 540, 551.) We must therefore determine, first, the *power* of the board of directors of the 1864 corporation to enact the by-laws here pertinent and, second, the *scope* of those by-laws.

As we shall explain, we believe the Legislature validly *empowered* the board to fix the composition of the membership by enacting the act of 1862. (Stats. 1862, p. 200.) To quote *Bennett,* "Under the 1862 act one of the purposes for which the corporation, and hence the directors, could make by-laws was to regulate 'the time and manner in which any person may become, or may cease to be, a member of the corporation.' . . . This language was broad enough to permit the directors to adopt by-laws specifying the conditions under which membership rights might be acquired or lost." (*Bennett v. Hibernia Bank, supra,* 47 Cal.2d 540, 551.) In view of this holding of *Bennett* we believe that the board of directors did have authorization under the act to determine the composition of the membership of the 1864 corporation.

Appellants in substance contend that the by-laws could not validly sever the right of descendibility and that neither legislative enactment nor by-law provision could remove the member's right of descendibility without violation of due process. As we shall point

out, however, two decisions recognize the authority of the Legislature to give the power of selectivity of membership to the board. *Bennett* specifically states: "*In the absence of a statute, by-law or other regulation to the contrary,* these rights [property rights in the assets of the corporation] were transferable." (Pp. 551-552; emphasis added.) The court then proceeds to analyze the effect and application of article 4 of the by-laws and poses the question whether or not it controlled those who became members *before* or *after* its adoption. The court does not raise even the scintilla of a question that the statute authorizing, or the by-law exercising selectivity of membership was invalid. Indeed, it states the opposite; the right of transferability survives only in the *absence* of such a statute or by-law. The court defines the issue for the trial court as one of interpretation only, in which extrinsic evidence would be appropriate to ascertain the proper construction. The Supreme Court would not have called upon the trial court to determine if the by-law were retroactive if such an application would do no more than render it invalid.

Doyle reiterates the *Bennett* ruling that the statute validly authorized the board to select the membership of the corporation and to prevent acquisition of membership by any means other than those designated. The court states: "*Bennett v. Hibernia Bank, supra,* 47 Cal. 2d 540, held that under the 1862 act the by-laws could provide the conditions under which membership rights might be acquired or lost." (*Doyle v. Hibernia Bank, supra,* 156 Cal. App. 2d 16, 20.) The

two decisions thus sustain the legislative power to give Hibernia of 1864 the right to determine its composition and to exercise any claimed right of transferability in members of Hibernia of 1859. Neither the decisions nor the statute itself suggest that the statute gave the board the right to provide for the manner in which a person could become a member, *with the exception* that members of Hibernia of 1859 retained the right to assign membership by manner and means of transfer. The Legislature gave a complete and unlimited right to determine membership.

We turn, then, to the next question as to how the board used the right so granted to it: the scope of the by-laws. Did the by-laws limit the right of membership in such fashion as to eliminate transferability of membership? Article 4 of the 1864 by-laws, as we have stated, provided that "[a]ll persons who were members of The Hibernia Savings and Loan Society [of 1859] on the twenty-ninth day of August, 1864, shall be deemed and considered members of this corporation," and that "[o]ther persons may be allowed to become members of this corporation by a vote of the Board of Directors, and not otherwise." Did the by-laws set up a bifurcated membership with one class of membership which entailed transferability and another which negated it?

We do not believe that Hibernia of 1864 contemplated two classes of membership with divergent rights. The by-laws themselves, the agreement to become members, and the previous judicial interpretations indicate that the bank consisted of one type of

membership embracing both those who had been members of Hibernia of 1859 as well as those subsequently selected for membership.

The agreement to become members, issued at the same time as article 4 was framed, and itself referring to the by-laws, discloses that the objective was to set up one class of membership. Certainly it provided that the members of Hibernia of 1859 "adopt, accept, ratify and approve" the incorporation of the society under the 1862 act; these persons "grant & convey, assign, transfer and set over to . . . the Corporation incorporated under . . . [the 1862 act], all our and each of our right, title and interest in and to all the property" of Hibernia of 1859. These members of the prior organization agreed to become members of Hibernia of 1864. Persons who were not members of Hibernia of 1864 likewise "agree to become, and each of them is hereby declared to be, a Member of said Corporation." Thus both the older group of members of Hibernia of 1859, as well as the new group who were not members of Hibernia of 1859, agreed to become members of the new corporation. Nothing whatsoever indicates that the former were to retain certain rights which were not to be enjoyed by the latter. The instrument breathes of the purpose of setting up a single class of membership. Nor is it material for this purpose whether appellants' ancestors signed the agreement to become members, as did Curtin, the predecessor, in *Bennett*. The relevance of the document lies not in its effect as an express agreement by the ancestor regarding his rights but as an

indication of the kind of organization the incorporators established.

The concept of a single membership, none of whom would *per se* enjoy the right of descendibility, accords with the implications which arise from the plan and purpose of Hibernia of 1864. At the time the parties became members of the 1864 corporation they obviously were all living. Consequently, the possibility of the enjoyment of these contingent rights lay entirely in the future. The severance of such future rights affected one class as much as the other. To hold that members of the new corporation would agree to, and were entitled to, lesser rights on this score than those of the old corporation is to hypothecate an unsupported duality. We cannot consider that the incorporators planned to establish differing classes of membership with divergent rights although they did not use a single word to say so.

The cases substantiate this reasoning. *Bennett* suggests no doubt of the *meaning* of the by-law as to prohibition of descendibility but questions whether the by-law should be *applied* to "any member" or "as governing only the rights of those who might join the corporation after adoption of the by-law and as providing that such persons, upon becoming members, would acquire only nontransferable membership rights." (P. 552.) Nondescendibility would in such case cover future members only. The court held that upon trial "the parties should be entitled to produce extrinsic evidence in support of their respective inter-

pretations." (P. 552.) Appellants have presented no such extrinsic evidence here.

Doyle likewise holds the two described methods of acquisition of membership to be exclusive. There the ancestor became a member after 1864 by election of the board of directors; this court held in the absence of "any suggestion of evidence to be offered on the interpretation of the by-laws as to membership" his "property rights" terminated upon his death and the trial court properly granted the summary judgment for defendants. (P. 19.) Beginning with the premise that *Bennett* "held that under the 1862 act the by-laws could provide the conditions under which membership rights might be acquired or lost" the court states that its task is "to determine what the by-laws provided concerning membership rights upon the death of a member." (P. 20.) As to this, "The only provision on the subject is in section 4." (P. 20.) Noting that this section and subsection amendments provided exclusively for the two classes of membership described above, the court concludes, "While there is no express statement of what would happen in the event of the death of a member, it is clear that his membership thereby terminated and could not pass on to his heirs for the reason that membership was entirely dependent upon vote of the directors." (P. 21.) (*Doyle v. Hibernia Bank, supra,* 156 Cal.App. 2d 16.)

Tieing the by-laws into the 1862 act, the court described the incongruity of Doyle's attempted interpretations: "The Act of 1862, (Stats. 1862, ch. 187, p.

200) prescribed that the by-laws could provide 'the time and manner in which any person may become, or cease to be, a member of the corporation. . . .' It would be a rather distorted interpretation to hold that in providing that except as to the then existing members, 'other persons' could only become members by vote of the board of directors the by-laws meant *any other person than heirs of a member.* Likewise it would be a similar distortion to hold that although not members such heirs would have all the rights of members." (Pp. 22-23; emphasis added.)

Bennett states that the board had the *power* to pass the by-laws, binding upon all members of Hibernia, of 1864; *Doyle* holds that the board *exercised* the power and passed by-laws which prohibited any right of descendibility or inheritability.

The *Doyle* interpretation that the by-law did not allow for descendibility finds a parallel in the situation in *Taylor v. Edson* (1849), 58 Mass. (4 Cush.) 552. Here, in the language of the Massachusetts Court, the legislative act provided "that the corporation should have power to make by-laws, determining the manner by which persons should thereafter become members thereof." (P. 523.) Subsequently the defendant religious society, "in pursuance of the authority conferred," adopted a by-law that persons who annually paid a specified sum ". . . 'shall be deemed members'. . . ." (P. 523.) Plaintiff, an original incorporator of the society, and a recorded member for thirty years, refused to make the payments, and the society, in turn, "because he had failed to comply with

the by-laws above mentioned," refused to permit him to vote. (P. 524.) In his subsequent action to establish membership, the court held, first, that the society had the power to adopt the by-law, and, second, that it applied "to those who were members before its adoption." (P. 528.) The court said: "The language of these by-laws is general; and the subject of them as stated in the title is 'membership.' The obviously expedient rule, and one we should anticipate would be adopted, would be one alike operative upon old and new members, in reference to their liabilities and forfeitures for neglect to contribute to parochial charges. The symmetry of the system would require such a rule, and this seems to be the reasonable construction of these by-laws." (P. 528.)

While appellants seek to distinguish the case upon the ground that the court narrows its inquiry as to the validity of the by-law to the special laws governing religious societies, this limitation pertained to the power of the society to pass the by-law rather than the scope of it. The decision buttresses *Doyle* as to the meaning of the by-laws here in question.

Appellants attempt to distinguish both *Bennett* and *Doyle*. As to *Doyle*, they contend that the involved membership did not begin until 1889, long after the enactment of the involved by-laws. This fact, however, does not detract from the court's interpretation of the application of the by-laws. As to *Bennett*, appellants offer two comments which we now discuss.

First, appellants argue that the September by-laws must be treated as "subsequent" to incorporation of

Hibernia of 1864; hence, "retroactive" and invalid. The fact, however, that the by-laws were passed some thirty days after the filing date of the certificate of incorporation does not make their operation "retroactive" in the sense claimed by appellants. The by-laws defined the rights of the members and the method of operation of the corporation. To contend that upon the day of filing of the certificate, the rights of a member become inviolate, so that any by-law worked a *retroactive* effect upon him, is to establish unrealistic artificialities in the corporation. Since the drafting of by-laws necessarily followed the filing of articles, the corporation in the very process of formation would inevitably have been saddled with rights of members which the by-laws could not retroactively impair. Such a construction would be in basic conflict with the provisions of the statute which gives the directors the power to fix the terms of membership. Hence *Bennett* does not treat these by-laws of 1864 as retroactive, subject to the test of reasonableness, the test which it does apply to the 1868 by-laws, enacted, not in the period of the corporation's formation, but long afterwards.

Second, appellants attempt to distinguish *Bennett* upon the ground that Curtin signed the agreement to become members and thereby ratified the by-laws of September, 1864. Since neither Mel nor Masten signed such agreement, Curtin's ratification, appellants claim, makes inapplicable here the ruling in *Bennett*. But, as *Bennett* points out, Curtin's agreement to become a member "does not necessarily mean anything more

than he was agreeing to the reorganization under that particular statute rather than to incorporate existence of some other type." (P. 553.) It would not necessarily extend "to subsequent steps taken by the new corporation such as the adoption of by-laws." (P. 553.) Curtin did not, therefore, necessarily ratify the by-laws of 1864 or 1868. If he had, such ratification would have been a complete defense to an attack upon both sets of by-laws, and the issue would have been resolved. But the fact that ratification would have sustained them does not mean the by-laws of 1864 are not otherwise valid. As we have said, *Bennett* upholds their validity upon the ground that they were authorized under the act of 1862, and the subsequent discussion of the effect of the alleged ratification does not in any way disturb that ruling.

Concluding that the board exercised its valid authority to sever descendibility of membership, we turn to the second issue which we suggested above. Even upon the assumption that the by-laws of 1864, based upon the 1862 statutes, could not operate to deprive all members of Hibernia of 1864 of descendibility, but that the members of Hibernia of 1859 constituted a special class, whose rights must be separately tested, we doubt that the right to membership was descendible. Appellants' contention that the by-laws unlawfully attempted to sever retroactively the right of descendibility which inured in that membership poses the underlying question of whether the original 1859 membership actually encompassed descendibility; whether such a right existed in the first instance.

Looking at the bank in the light of the contemporaneous objectives we find the certificate of incorporation expresses two basic purposes: "[T]hat the object for which it is formed is, that by means of it the members thereof may be enabled to find a secure and profitable *investment for small savings*, and may have an opportunity of *obtaining from it the use of a moderate capital*, on giving good and sufficient security for the repayment of the same . . ." (Emphasis added.) These purposes found concrete application in the provisions for the "liberty" to deposit and the opportunity to obtain loans. Since members had the right to obtain loans, it is extremely doubtful that the founders intended that persons not selected for membership could acquire it by assignment, heirship or otherwise. The poor credit responsibility of such membership could destroy the bank. The history of banking institutions in the immediate prior period in San Francisco had been marked by such failures.[19] The early history of savings banks in Scotland and Britain discloses a purpose to make possible small savings for special

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[19] "In 1855, as the result of bad banking methods several financial institutions failed, and the business community suffered severely. There were 197 failures with liabilities amounting to $8,000,000. . . . The banking trouble of this period was largely attributed to the failure of the State to exercise a proper surveillance over the operations of financial concerns. Owing to the distrust of corporations which was excessive at the time of the adoption of the first constitution the state was prohibited granting charters for banking purposes, or of the issuance and circulation of bank notes. . . ." (John P. Young, San Francisco, A History of the Pacific Coast Metropolis (S. J. Clarke Pub. Co., 1912), vol. I, p. 282.)

groups.[20] As we have pointed out, one of the stated purposes of the organization of the band was to adopt "some plan by which the thousands of Irish, residing in this country might have some secure place of deposit for their savings . . ." In the early nineteenth century the idea of closed and special membership was common to fraternal benefit associations, labor unions and similar institutions and obtained, at the time, unquestioned acceptance in the courts.[21] The above considerations cast grave doubt upon appellants'

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[20]The illuminating history of the savings bank movement in Britain and Scotland is set out in Horne, A History of Savings Banks (Oxford University Press, 1947) and Kniffin, The Savings Bank and its Practical Work (The Bankers Publishing Company, 1928). Conceived as a method of encouraging thrift to meet the problems of deep poverty of the early nineteenth century, the advocates of savings banks made use of the "friendly societies" of the day as a prototype organization (Horne, pp. 4-42ff). Dr. Duncan of Ruthwell, Scotland generally accredited with having established the first successful savings bank, saw its purpose to be the facilitation of the making of small savings; "[s]avings banks in every parish would restore the independence of the Scottish people." (Horne, p. 43.) The Ruthwell Savings Bank, which opened in 1810, set up elaborate rules for three types of membership and provided even for "inquiries into the morals of the depositors." (Horne, p. 47.) The depositor's "age, family affairs, moral conduct, etc." were looked into and if the report was favorable he was allowed to "'join the bank'. . . ." (Kniffin, p. 9.) The banks made possible the deposit of small savings with interest rather than the procurement of loans to borrowers. The Edinburgh Bank, founded in 1814 and based upon the same idea, "did not make inquiries into the morals of the depositors. . . ." (Horne, p. 47.) Banks "were started all over Scotland in 1814 and 1815 . . . sometimes founded on the Ruthwell model and sometimes on that of Edinburgh" (Horne, p. 47), but the Edinburgh type actually prevailed.

[21]See *Greenwood v. Building Trades Council* (1925), 71 Cal. App. 159, 171 [233 P. 823]; *Parkinson Co. v. Building Trades Council* (1908), 154 Cal. 581 [98 P. 1027, 16 Ann.Cas. 1165, 21 L.R.A. N.S. 550]; 29 Cal.Jur.2d 793, § 55.

claim of promiscuity of membership in Hibernia of 1859; selectivity of membership would appear to be inherent in its nature.

Significantly, the by-laws limit the transferability of shares to members: "[S]uch share may be transferred on the books of the Society to *any member* of the same, by the owner paying a fee of Fifty Cents, for the transfer of each share, and surrendering the Certificate which shall be marked 'cancelled' on its face." (Emphasis added.) And, since the ownership of shares represents a higher level of participation in the corporation than membership, the express limitation upon transfer of the former indicates a similar intention as to the latter. The by-laws nowhere provide for transfer of shares or membership to those other than shareholders or members. While the by-laws do not expressly prohibit transferability, we believe the injection of such a right inconsistent with the scheme, the purpose, the function of the institution.

If transferability did not inhere in membership of Hibernia of 1859, the by-laws of 1864 did no more than make express that which was implied, and they did not operate retroactively at all. Finally, however, assuming that the by-laws of 1864 did retroactively sever such a right, we reach the third issue set out above. If the by-laws did operate retroactively, they were not void, but subject to the test described in *Bennett*.

While *Bennett* did not apply the test of reasonableness to the prohibition of the transferability of the membership but only to the requirement for depositor-

ship, the test would, if prohibition of transferability were found to be retroactive in effect, likewise apply to such a provision. The by-law which retroactively attached the condition of depositorship to the membership would be no different in kind than a by-law which retroactively removed the attribute of transferability. Both the loss of membership by nondepositorship or by invalidity of transfer attach qualities or characteristics to membership. If one may be removed or imposed, so may the other. Indeed, appellants themselves, claiming that the by-laws are retroactive, recognize the applicability of the test set out in *Bennett.*

The *Bennett* test is two-pronged: "The reasonableness of the by-law must be considered in the light of all the circumstances, including such matters as the purposes for which the corporation was organized and the extent of the rights of the particular member involved." (*Bennett v. Hibernia Bank, supra,* 47 Cal.2d 540, 552.) We probe the "purposes" of the association as well as the "rights" of the members. As to the latter, the cases cited by *Bennett* as well as those relied upon by appellants, disclose the nature of the rights of a member which a by-law cannot retroactively extinguish.

People's Home Savings Bank v. Superior Court (1894), 104 Cal. 649, 653 [38 P. 452, 43 Am.St.Rep. 147, 29 A.L.R. 844], cited in *Bennett,* states: "The *substantial* rights of a stockholder under the law cannot be taken from him, or even abridged by the by-laws." (Emphasis added.) *State v. San Francisco Sav. Etc. Soc.* (1924), 66 Cal.App. 53 [225 P. 309], like-

wise cited by *Bennett*, quoted 3 R.C.L., section 339, to the effect that ". . . 'the fact that a by-law of which a depositor has notice authorizes the amendment of the by-law does not operate to change the depositor's contract where a *material amendment* to the by-law is made without notice to him, and without his consent.' " (P. 61; emphasis added.) *Bornstein v. District Grand Lodge No. 4* (1906), 2 Cal.App. 624 [84 P. 271], cited in *Bennett*, as well as by appellants, relies upon *Langan v. American Legion of Honor* (1901), 34 Misc. 629 [70 N.Y.S. 663], to the effect that the power to make changes in the by-laws that had a retroactive effect "had reference to changes which should not impair the *substance* of the contract." (P. 631; emphasis added.) *Inderkum v. German Old People's Home* (1937), 23 Cal.App.2d 733, 736 [74 P.2d 83], cited by appellants, holds: "The rule established by said authorities appears to be that such contracts are not void for lack of mutuality as the right reserved extends merely to the making of reasonable administrative or regulative amendments and does not extend to the making of any amendments *which would impair the substance of the contract.*" (Emphasis added.)

Tested by whether or not the loss of descendibility was "substantial" in view of the purposes for which the corporation was organized, the by-laws were reasonable. Obviously the 1864 structure constituted a membership corporation; its by-laws expressly provided for selectivity of that membership. The right to transfer membership would nullify any possibility

of maintaining an exclusive and chosen membership. In the turbulent days of 1864 when San Francisco was a mecca to the varied peoples of the world, the right to transfer membership could result in the inclusion of all kinds of persons, quite different from those who undertook the bank's establishment. The protection against such incursion worked as much to the advantage of the former members of Hibernia of 1859 as to those who subsequently became members. It preserved the continuity of a special membership and the integrity of the bank in accordance with the purposes of the by-laws. Thus members of Hibernia in 1859 *lost* no substantial right by the by-laws of 1864 but *gained* protection against an unwanted heterogeneous and polyglot membership. In this light, the power to transfer membership or grant it through heirship, exercisable only in the future, was insubstantial and minor as compared to the immediate importance of preserving a kind of membership which the founders intended. Thus the elimination of promiscuity of membership, instead of defeating a substantial right of members of Hibernia of 1859, implemented the purpose of the incorporators of Hibernia of 1859 to set up an institution composed of a special and selected membership. Compounded upon the purposes of the bank, the insubstantiality of the severed "right" confirms the conclusion that the by-law was reasonable "in the light of all the circumstances."

In summary we do not believe that the alleged membership of appellants' predecessors in Hibernia of 1864 carried with it the right of descendibility; we

doubt the presence of any such right in membership in Hibernia of 1859; but, even accepting appellants' argument that there was a retroactive severance of such right, such severance was reasonable.

We conclude this lengthy rehabilitation of events long since passed with the conviction that appellants can neither surmount the discontinuation of their predecessors' depositorship in Hibernia nor their deaths of more than a half century ago.

We affirm the judgments.

Tobriner, J.

Bray, P. J., and Ford, J.* concurred.

Filed November 28, 1960.

Lawrence R. Elkington, Clerk.

*Assigned by Chairman of Judicial Council.

Appendix B

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil Nos. 19,193, 19,194, 19,195

ALICE MASTEN SPENCER, as Administratrix, etc., *Plaintiff and Appellant,* vs. THE HIBERNIA BANK, a corporation, et al., *Defendants and Respondents.*	1 Civil No. 19,193
ALICE MASTEN SPENCER, et al., *Plaintiffs and Appellants,* vs. THE HIBERNIA BANK, a corporation, et al., *Defendants and Respondents.*	1 Civil No. 19,194
MARIAN MEL, as Special Administratrix of the Estate of John Mel, Deceased, *Plaintiff and Appellant,* vs. THE HIBERNIA BANK, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF RICHARD M. TOBIN, DECEASED, FLORENCE ADELE TOBIN, JOSEPH O. TOBIN, EDWARD J. TOBIN, CYRIL R. TOBIN, CONSTANCE DE YOUNG TOBIN, BEATRICE TOBIN RAOUL-DUVAL, RUTH HAWKINS TOBIN, ABBY PARROTT TOBIN, CELIA TOBIN CLARK, RICHARD RAOUL-DUVAL, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF CHARLES J. BARRY, DECEASED, ERNEST O. MCCORMICK, JR., LEO O'GRADY, SHELDON G. COOPER, JOSEPH O. TOBIN, TRUSTEE, CYRIL R. TOBIN, TRUSTEE, RICHARD RAOUL-DUVAL, TRUSTEE, ERNEST O. MCCORMICK, JR., TRUSTEE, SHELDON G. COOPER TRUSTEE, DOES ONE TO FIFTEEN, *Defendants and Respondents.*	1 Civil No. 19,195

BY THE COURT

Good cause appearing therefor, the opinion heretofore filed in the above entitled case is corrected of record as follows:

On the last line of page 14 of the original opinion (186 A.C.A. p. 783, line 9), after the word "no" add the word "appropriate".

On the last line of page 41 of the original opinion (186 A.C.A. p. 800, line 28), after the word "formation" insert a comma and the words "upon appellants' hypothesis" followed by a comma.

On the first line of page 42 of the original opinion (186 A.C.A. p. 800, line 30), insert quotation marks around the word "retroactively".

The petition for rehearing is denied.

Dated, December 27, 1960.

Bray, P. J.

Filed, December 27, 1960.
Lawrence R. Elkington, Clerk.

Appendix C

(Vol. 186 A.C.A. 815.)

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 18,831

OLIVE BENNETT, et al.,
Plaintiffs and Appellants,

vs.

THE HIBERNIA BANK,
(a corporation) et al.,
Defendants and Respondents.

OPINION

Appellants appeal in this case from a summary judgment rendered after remittitur upon reversal

by the Supreme Court in *Bennett v. Hibernia Bank* (1956), 47 Cal.2d 540 [305 P.2d 20]. The Supreme Court reversed the judgment of the trial court entered upon sustaining a demurrer to the amended complaint.

Since the Supreme Court in its opinion summarizes the complaint, we do not do so here. The basic facts as to the history of the bank parallel those set forth in *Spencer*. (*Spencer v. Hibernia Bank* (1960), *ante*, [1]p. —— [—— Cal. Rptr. ——].) As to appellants' status, the opinion points out, "Curtin became a member of Hibernia on October 27, 1860, when he signed the by-laws, paid the entrance fee, made a deposit of $3,500 and received a passbook showing the amount of his deposit." (*Bennett*, p. 546.) The amended complaint alleges, "on information and belief," that Curtin signed the agreement to become members provided for in the 1864 by-laws.

After reversal by the Supreme Court respondents took certain depositions, filed their answer to the amended complaint and, pursuant to section 2033 of the Code of Civil Procedure, made requests for admissions to which appellants filed their responses. Among other matters respondents requested admissions to the following questions: "42. Plaintiffs [appellants] have no extrinsic evidence bearing on (a) the interpretation of Article 4 of Hibernia's by-laws adopted September 29, 1864; (b) The application of said Article 4 to those who were members of Hibernia prior to the adoption of said Article 4. 43. Plaintiffs [appellants] have no extrinsic evidence bearing on the reasonableness of

[1]Advance Report Citation: *Ante*, p. 770.

Hibernia's by-law adopted in 1868 reading 'No one shall be deemed a member whose account is once closed,' as applied to one who was a member prior to its adoption." Appellants' attorney responded to these requests, stating, "admits the statements contained in the Request for Admissions 42 and 43 but reserve to themselves the right to produce by deposition or otherwise such extrinsic evidence as referred to in Requests for Admission 42 and 43 as such deposition or search or other investigation may hereafter produce and without any waiver to the future production of such extrinsic evidence."

Based upon "the 'First Amended Complaint for Declaratory Relief,' the Request for Admissions Nos. 42 and 43 . . . [and] the Plaintiffs' [appellants'] Response to said Requests for Admissions," respondents filed their motion for summary judgment. In support of the motion respondents also filed an affidavit of Cyril R. Tobin, which contained the verbatim text of the "Agreement to Become Members," that "does not appear in the record," when the Supreme Court adjudicated the case. (*Bennett*, p. 553.)

In opposition to respondents' motion, Morris Lavine, counsel for appellants, filed two affidavits. The first affidavit states in part that the Tobin affidavit "does not set forth that there is no such extrinsic evidence, nor does it disclose any minutes of the Hibernia Bank showing its interpretation by the conduct of its officers and directors or otherwise of the by-laws. . . ." It further alleges on information and belief "that substantial payments have been made either by the bank

or by its officers or directors to persons or their heirs who held memberships in the original Hibernia Bank . . . and that such conduct by such officers and directors or principal stockholders of the bank would constitute extrinsic evidence of the interpretation to be placed upon the by-laws of the Hibernia Bank." The affidavit states that "the deposition of Joseph B. Keenan shows payment of $2,500 by the bank for his interest acquired from his deceased father." It concludes with a prayer that affiant "be given an opportunity to produce such extrinsic evidence at the trial."

The second Lavine affidavit incorporates the testimony of Joseph B. Keenan given in a deposition of April 3, 1957, to the effect that he received from "the bank" in the year "about 1932 or something like that" the sum of $2,500 for the "original bank book" of his father. Upon information and belief, affiant further states that the decree in the estate of James M. Donahue, an officer and director of the bank, shows distribution of his savings account with Hibernia and "all rights appertinent [*sic*] to said deposits and pass book, including all rights . . . in the reserve of and other funds of said bank. . . ." Likewise, "Affiant is informed and believes and therefore alleges that the bank itself paid . . . [certain] sums for the interests . . . of persons" named Chambers, Doyle, Kepner, Ormant and Hatch; "[t]hat the Hibernia Savings and Loan Society also paid $175,000.00 for the interest of Thomas A. Mulkahy"; that "affiant is also informed and believes" the society "paid $50,000.00 . . . for . . . the interest of Thomas A. Driscoll, deceased; . . . that affiant is informed and believes that the bank paid . . .

approximately $95,000.00 for the interest of Mary Kate O'Brien. . . ." The affida also avers that Callaghan Curtin "was an original member" of the society and paid $3,500 for his membership.

Respondents filed two affidavits in support of their motion for summary judgment which we now analyze. The first, an affidavit of David J. Barry, a vice-president and trust officer of the bank, attested that "On October 27, 1860, one C. Curtin opened a savings account with Hibernia Savings and Loan Society by making a deposit of $3500." The second, a supplemental affidavit by Cyril R. Tobin, stated that as attorney for the bank he was "personally familiar with the fact that from time to time various persons have asserted claims" against the bank; that "[e]ach and every claim has always been denied." One of such claims was that of Joseph B. Keenan; "[i]n 1932 the said claim" was compromised and settled. The affidavit further alleged that after the final judgment in the in rem suit of the bank rendered on January 7, 1946, a number of persons filed motions to set aside the default judgment, among whom were Mulcahy, Murphy, DeCou, Doyle, Ormant, Chambers and Kepner, who were persons referred to in the Lavine affidavit. The affidavit states that these parties had received payment in compromise and settlement of their claims. It finally states that as to the Driscoll matter, referred to in the Lavine affidavit, "A payment was made . . . in compromise and settlement of said claim. . . ."

Pursuant to respondents' motion, the court granted a summary judgment, stating that none of the appel-

iants claiming to derive rights from Callaghan Curtin ever had any interest in Hibernia's property, assets or reserve fund; that membership in Hibernia of 1864 was not transferable or descendible; and that appellants are not entitled to set aside the judgment in *Hibernia v. Tobin* (San Francisco Superior Court No. 345334), which determined in rem the members of Hibernia and those having an interest therein.

Appellants' bases for appeal lie in the alleged following errors: (1) The affidavit of respondents and the request for admissions are insufficient grounds for granting summary judgment; (2) the affidavit of respondents is insufficient on which to predicate summary judgment; (3) appellants' counteraffidavit and "the testimony of Joseph B. Keenan taken by deposition and set forth" in the counteraffidavits sufficiently raise questions of fact; (4) the "so-called judgment . . . invade [*sic*] the province of the court and jury and deny plaintiffs' [appellants'] right of trial by jury"; and (5) the "procedure had in this case" would deny appellants due process of law and take their property rights without due process of law. We discuss each of these issues *infra*.

The Supreme Court left the case in the posture that the possibility of extrinsic evidence upon the issues as to whom article 4 of the 1864 by-laws applied, and whether the 1868 amendment was unreasonable, prevented the conclusion that appellants as a matter of law had no interest in respondent bank. If appellants' five points will not stand their position collapes under the weight of the Supreme Court's decision and our

construction of these two crucial by-laws this day in *Spencer v. Hibernia Bank*. Indeed, appellants have incorporated appellants' brief in that case; we have treated the issues in both concurrently, and we believe this court may, where necessary, take judicial notice of the record. (*City of Los Angeles v. Abbott* (1932), 217 Cal. 184, 193 [17 P.2d 993]; *Hammell v. Britton* (1941), 19 Cal.2d 72 [119 P.2d 333].) We proceed to examine each of the points.

As to the first point, appellants state, "There is no provision in section 437c, C.C.P., for summary judgment to be based upon requests for admissions and admissions." The recent decision of this court, speaking through Justice Duniway in *Buffalo Arms, Inc. v. Remler Co.* (1960), [1]179 Cal.App.2d 700, 702-703 [4 Cal.Rptr. 103], disposes of this contention: The "motion for a summary judgment . . . anticipated by 25 years the discovery sections recently added to the Code of Civil Procedure, sections 2016-2035. Their addition to our law should make the summary judgment procedure more useful than it has been heretofore. When discovery, properly used, makes it 'perfectly plain that there is no substantial issue to be tried' . . . section 437c, Code of Civil Procedure, is available for prompt disposition of the case. In the present case, the plaintiff properly relies in part on defendant's sworn answers to plaintiff's requests for admissions, under Code of Civil Procedure, section 2033."

Appellants' exposition of their second point, that "The affidavit of the defendants [respondents] is

[1]Advance Report Citation: 179 A.C.A. 765, 767.

wholly insufficient on which to predicate . . . summary judgment," consists of nothing more than a statement of general principles regarding summary judgment. As to the Tobin affidavit, appellants make the cryptic statement, included under the first heading of the brief, rather than the instant one, "It does not appear that Mr. Tobin is the custodian of the records, although he does state that part of his duties as an attorney was to be familiar with the records. . . ." The affidavit did no more than set out *in haec verba* the agreement to become members. Whether appellants are attacking the authenticity of the content of the agreement, the fact that the original agreement was not introduced, or a possible failure to comply with section 1953f of the Code of Civil Procedure is immaterial. The wording of the agreement does not provide for that ratification of the 1864 by-laws which the Supreme Court envisaged, and which respondents obviously desired; it has no bearing here.

We turn to a consideration of appellants' third position: their contention that the counteraffidavits raise questions of fact. The first affidavit of Morris Lavine, predicated upon information and belief, however, succumbs to respondents' charge that it "is incompetent as hearsay and conclusory." As we have pointed out in *Spencer*, an affidavit based upon hearsay in a proceeding for summary judgment is "of no value in determining whether there were issuable questions of *fact*." (*Whaley v. Fowler* (1957), 152 Cal.App.2d 379, 382-383 [313 P.2d 97]. To the same effect: *Schessler v. Keck* (1956), 138 Cal.App.2d 663, 668 [292 P.2d 314]; *Maltby v. Shook* (1955), 131 Cal.App.2d 349, 351

[280 P.2d 541]; *Shea v. Leonis* (1938), 29 Cal.App.2d 184, 188 [84 P.2d 277].)

The second Lavine affidavit, in alleging payments by Hibernia for named interests, does not advance appellants' position. It fails for the same reason as the first.

The portions of the affidavit as to the Donahue estate and the O'Brien interest rest upon information and belief. The remaining portion of the affidavit, affiant's report of what the Keenan deposition states, is likewise hearsay; the Keenan deposition was not offered as evidence in the trial court and is not before this court.

Mr. Lavine's contention that his affidavits, upon information and belief, are sufficient because as an attorney, he is in a representative capacity within the meaning of section 437c cannot stand. This section, in part, reads "When the party resisting the motion appears in a representative capacity, such as a trustee, guardian, executor, administrator, or receiver, then the affidavit in opposition by such representative may be made upon his information and belief." The specified representatives constitute and exclusive list; to hold that attorneys are included would, in effect, repeal the requirement that the affidavit contain facts as to which the affiant could testify competently.

The allegation in the affidavit that Curtin paid $3,500 for a membership in Hibernia in 1860, apparently based upon the affidavit of Callaghan Curtin of September 19, 1914, attached to respondents' "Answer to First Amended Complaint" as Exhibit 6 does not

find confirmation in the affidavit. The affidavit shows that Curtin deposited that sum in the bank, not that he purchased membership with it.

Appellants' fourth and fifth points are mere restatements of the basic issues of the case. Their fourth assertion that the judgment invades the province of the court and jury and denies the right of trial by jury recasts the argument that a question of fact is presented. Since we have pointed out no such issue exists, the argument falls. (*Bank of America, Etc. v. Oil Well Supply Co.* (1936), 12 Cal.App.2d 265 [55 P.2d 885]; *Poochigian v. Layne* (1953), 120 Cal. App.2d 757, 764 [261 P.2d 738].)

Similarly, the argument that appellants' property rights have been taken without due process of law assumes the existence of such property rights. We have pointed out *supra* and in *Spencer* that appellants have failed to establish such property rights.

We have examined each of the five propositions of appellants and find them wanting. These assertions make no case, and the principles set out in *Spencer* as well as the underlying rulings of the Supreme Court's decision in *Bennett v. Hibernia Bank, supra,* 47 Cal.2d 540, control.

We affirm the judgment.

Tobriner, J.

Bray, P. J., and Ford, J.,* concurred.

Filed, November 28, 1960,
Lawrence R. Elkington, Clerk.

*Assigned by Chairman of Judicial Council.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 176

ALICE MASTEN SPENCER, as Administratrix, etc.,
Appellant,

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THE HIBERNIA BANK, a corporation, et al.,
Appellees.

ALICE MASTEN SPENCER, et al.,
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MARIAN MEL, as Special Administratrix of the Estate of John Mel, Deceased,
Appellant

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Motion to Dismiss

MOSES LASKY
111 Sutter Street
San Francisco 4, California

JAMES FARRAHER
2000 Mills Tower
San Francisco 4, California

Attorneys for Appellees

SORG PRINTING COMPANY OF CALIFORNIA (FORMERLY PARKER PRINTING COMPANY)
160 FIRST STREET SAN FRANCISCO 5 CALIFORNIA

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Appellees.

Motion to Dismiss

Appellees move to dismiss the appeals from the District Court of Appeal of the State of California, First Appellate District, in each of the three cases, on each of the grounds stated in this Court's Rule 16(1)(b), as follows:

1. The alleged federal questions sought to be reviewed were not timely or properly raised or expressly passed on.
2. The judgments rest on an adequate non-federal basis; and
3. The appeals do not present a substantial federal question.

STATEMENT OF THE CASE

Appellants concede (Juris. State. 15) that the facts are stated correctly in the opinion below, and we therefore cite it for statements of fact.[1]

Over 100 years ago, in 1859, a San Francisco bank, "Hibernia Savings & Loan Society" (hereafter called "Hibernia of 1859"), was formed as a corporation with capital stock under a California Act of 1853 (App. 5). Its by-laws provided that depositors should pay a $2.00 "entrance fee" and sign the by-laws and would then be "styled" "members", and that "members" who acquired stock would also be stockholders (App. 5).

In 1862 California enacted a statute permitting a banking business to be carried on by membership corporations. An Act of 1864 then authorized existing banking corporations to reincorporate under the Act of 1862 (App. 7).

August 29, 1864, a membership corporation was incorporated under these Acts of 1862 and 1864, named "The Hibernia Savings and Loan Society". Pursuant to the authority of the Act of 1862 it immediately adopted a by-law defining how one became and ceased to be a member. This by-law provided that the only way one could become a member was by election of the Board of Directors, except that all persons who were members of the old bank, "Hibernia of 1859", on the day the new bank was formed, "shall be deemed and considered members of this corporation, and the signatures of such persons to an agreement on their part to become members of this corporation" should be procured (App. 8). Eighty-three years later, in 1947, this new bank was legally converted into a stock corporation, and its stock was issued to those recognized as its members (App. 9). Its name was then changed to "The Hibernia Bank". It is the appellee of that name, and we refer to it hereafter as "Hibernia of 1864" or simply as "Hibernia".

1. As a copy of the opinion is attached to appellant's Jurisdictional Statement as an appendix, references to the opinion are to pages of that appendix.

Nine years later, in 1956, appellants brought these suits in the State Court in San Francisco seeking a declaration that they were part owners of the bank. Appellant in the *Mel* case claimed by descent from one John Mel, who died in 1892. Appellants in both the *Spencer* cases claimed by descent from one N. K. Masten, who died in 1901.

Mel and Masten had each become depositors of "Hibernia of 1859" in 1859 with a deposit of $5.00. Mel was never a stockholder, and he ceased forever to be a depositor in 1861, three years before Hibernia was formed (App. 7). Masten owned one share of stock for a while but surrendered it for cash in 1861. He too ceased forever to be a depositor before Hibernia was formed in 1864. Neither Mel nor Masten was ever elected a member of Hibernia or ever had anything to do with it (App. 8).

Two main questions were argued below:

1. Did appellants' ancestors, Mel and Masten, ever become members of "Hibernia of 1864" at all?

2. If they did, did any rights pertaining to that membership descend to appellants; i.e., construing the statutes under which it was created, was a membership in "Hibernia of 1864" of a descendible kind?

The court below answered both questions against appellants and rendered judgment against them on motion for summary judgment. The judgment was affirmed by the District Court of Appeal, and the California Supreme Court denied a petition for a hearing. Appellants seek review here.

QUESTIONS PRESENTED

None of the questions stated in the Notice of Appeal (3, 4) is present.[2]

2. In the Jurisdictional Statement (14) appellants add another question, about dormant accounts. The case involves no dormant account. The accounts were closed out 100 years ago.

Appellants seek to present (1) a substantive question (a) under the 14th Amendment and (b) under the impairment of the obligation of contracts clause of the Constitution, Art. I, Sec. 10, and (2) a point of summary judgment procedure under the 14th Amendment. But in no court below did appellants ever assert that a state statute was repugnant to the federal constitution. Therefore no appeal to this Court lies. *Charleston Ass'n v. Alderson*, 324 U.S. 182, 185. Even treating the appeal as a petition for certiorari, it is improper, as we now show, first as to the substantive question and then as to the procedural.

DISCUSSION

I. The Substantive Question.

A. IT WAS NOT TIMELY OR PROPERLY RAISED.

Appellants never, in any way, referred to any substantive contention under the 14th Amendment or to Article I, Sec. 10, either in the court of first instance or in the court below until, after the latter's decision, they did so cursorily in a petition for rehearing and in a later petition for hearing by the State Supreme Court. But under California procedure contentions may not be first raised in either of these ways. *Smith v. Crocker First Nat. Bank*, 152 C.A. 2d 832, 836, 314 P.2d 237; *Flores v. Stone*, 21 Cal. App. 105, 111, 131 Pac. 348. And this Court has held that it is not timely to raise a federal question so late. *Herndon v. Georgia*, 295 U.S. 441, 443; *American Surety Company v. Baldwin*, 287 U.S. 156, 163-164; *El Paso & Southwestern R. Co. v. Eichel & Weikel*, 226 U.S. 590, 598.

To escape this principle appellants assert that "the issue of constitutionality * * * was raised by the opinion of the District Court of Appeal itself" (Juris. State. 17). This assertion is not so. The sole basis assigned for it is merely that the opinion denied that Hibernia's first by-laws were unauthorized, retroactive, or invalid. But this simply answered appellants' arguments. This is

not a case where a "surprise" decision of a court first raises a constitutional issue, like *Missouri v. Gehner*, 281 U.S. 313 or *Great Northern R. v. Sunburst Co.*, 287 U.S. 358, which appellants cite. Here the issue of alleged retroactivity and of its legal effect had been raised *but only as a question of state law*. And it was answered only as a question of state law. Such an issue raises no federal question. *American Surety Co. v. Balduin*, 287 U.S. 156. As said in *Gibbes v. Zimmerman*, 290 U.S. 326, 328, referring to a contention of impairment of the obligation of contracts under Article I, Section 10,

> "We cannot consider this contention, since in his pleading the appellant relied solely on the provisions of the state constitution with respect to the obligation of contracts, and made no reference to § 10, of Article 1 of the Federal Constitution; and the Supreme Court, in disposing of the case, did not mention or discuss that section."

B. MOREOVER, THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

Appellants' case failed *either*

1. If the ancestors never became members of "Hibernia of 1864," or,

2. If, assuming that they did, a membership was not descendible.

Appellants' present assertion of constitutional rights is addressed solely to the second issue; they claim that the by-laws of "Hibernia of 1864" cut off descendibility and that the California Acts of 1862 and 1864 violated the 14th Amendment and Article I, Section 10 of the Constitution by empowering Hibernia by its by-laws to destroy "pre-existing property and contractual rights."

While the court treated the issue of descendibility of membership in "Hibernia of 1864", it did so because the issue had to be decided in other cases concurrently argued (see footnote, p. 8, infra), and the court used its opinion in the instant case as the

main opinion in the whole group (See *Burke v. Hibernia Bank*, 186 A.C.A. 806, 813, 9 Cal. Rptr. 890, 895; *Bennett v. Hibernia Bank*, 186 A.C.A. 815, 821, 9 Cal. Rptr. 896, 900; *Jacob v. Hibernia Bank*, 186 A.C.A. 822, 826, 9 Cal. Rptr. 901, 905) *But the court independently decided that Mel and Masten had never become members of "Hibernia of 1864" at all* (App. 21-34)

The Supreme Court of California had previously settled that no person became a member of "Hibernia of 1864", if not elected, except those who were members of "Hibernia of 1859" on the day the new bank was formed, *Bennett v. The Hibernia Bank* (1956), 47 C.2d 540, 305 P.2d 20. A crucial question, then, was whether the ancestors were members of "Hibernia of 1859" at that time (App. 21). The California Act of 1853, under which "Hibernia of 1859" had been formed, authorized a banking business to be done only by stock corporations and not by membership corporations, *People v. Perrin* (1880), 56 Cal. 345, 347. "Hibernia of 1859" was formed with stockholders, and Mel and Masten were not stockholders. In order to avoid the conclusion that they therefore had no property rights in "Hibernia of 1859" appellants argued that "Hibernia of 1859" was in reality not a stock corporation but an old style mutual savings bank (App. 21) in which the depositors are the members who own it. But it is elementary that when one ceases to be a depositor in a mutual he ceases to be a member and has no property interest whatever. Not only does this principle prevail throughout the United States and has been stated by this Court in *Society for Savings v. Bowers*, 349 U.S. 143,[3] but the issue is the nature of "Hibernia of 1859".

3. This Court there said (p. 150):

"The asserted interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposits and interest."

a California corporation which existed between 1859 and 1864. As appellants conceded in their petition to the California Supreme Court, that question was one of interpretation of the charter and by-laws of the 1859 corporation. This was peculiarly a California question, and the court below answered it by saying that under the charter and by-laws of "Hiberma of 1859", when Mel and Masten became members of *that* corporation, they acquired no rights that survived the closing of their accounts in that bank, and not being a member of the old bank on the day the new was formed, and never having been elected a member of the new, neither ever became a member of it. Consequently, he was deprived of no rights by the Acts of 1862 and 1864 or by the by-laws of the new corporation, *because he then had no rights of which to be deprived*. No federal constitutional question is involved.

Appellants assert that a decision of a state court interpreting a contract as not giving a party a claimed property or contract right is itself a federal question. But the principle of the case appellants cite (*Louisiana Railway & Navigation Company v. New Orleans*, 238 U.S. 164) is that where a state court gives effect to later legislation which would operate to impair the obligation of a contract if it exists, this Court has jurisdiction to determine whether the contract was made or was invalid or has become inoperative (p. 170). Where the decision does not give effect to a later act and is merely an interpretation of the contract under laws in effect when it was made, no constitutional question is raised. *Long Vault Development Co. v. Call*, 242 U.S. 272 at 277. Here the decision was that under the charter, by-laws, and California law in effect at the time "Hiberma of 1859" was formed, one becoming a member thereof acquired no rights and entered no contract giving him rights which survived the closing of his account. With that decision appellants were foreclosed without reaching the Acts of 1862 and 1864.

C. IN ANY EVENT THE FEDERAL QUESTION SOUGHT TO BE PRESENTED IS NOT SUBSTANTIAL.

No federal issue is involved, even if the ancestors had become members of Hibernia on its formation in 1864. In *Gentry v. Hibernia Bank*, 23 Fed. Rules Serv. 23a.53, Case 2 (1956), the United States District Court for the Northern District of California disposed of a group of cases asserting claims similar to appellants' with this statement, equally applicable here:

> "* * * The cases are peculiarly local, involving the construction of California statutes.
>
> "Without more, under these circumstances, it is sufficient to say that we are busy enough with legitimate federal causes, not to be bothered with local litigation, artfully, but not very successfully, dressed up in federal habiliments."[4]

1. Under the Fourteenth Amendment.

The contention that the Acts of 1862 and 1864 violated the 14th Amendment founders on the fact that the 14th Amendment was not adopted until 1868.

2. Under Article I, Section 10.

The contention concerning impairment of the obligation of contracts vanishes with the question of what contract rights the ancestors had. The acts of 1862 and 1864 impaired no rights in "Hibernia of 1864" because "Hibernia of 1864" was created under those acts, the only way one could become a member of it was pursuant to them, and the attributes of such a membership could be no more than they prescribed. What they prescribed is a California question.

Appellants therefore argue that the contract rights allegedly impaired were not rights in "Hibernia of 1864" but rights in

4. The *Gentry* group refiled in the state court, which rendered judgments for appellees similar to that here. No appeal was taken in some of the group; others were appealed to the court below, which heard them and decided them together with the present case, and no review by this Court has been sought.

Hiberma of 1859 , i e , that the creation of Hiberma in 1864 to supersede the prior corporation and the prescription that membership in Hiberma was non-descendible impaired rights theretofore existing But this simply begs the question of the nature of a 'membership' in Hiberma of 1859 under its charter and by-laws That too is a California question and the court below held that such a membership was itself personal and not descendible As the court said (App 45)

> Appellants' contention that the by-laws unlawfully attempted to sever retroactively the right of descendibility which inured in that membership poses the underlying question of whether the original 1859 membership actually encompassed descendibility, whether such a right existed in the first instance

And it answered (App 55)

> the severance of descendibility did not retroactively forfeit any right of Mel or Masten since the nature of Hiberma of 1859 and the 1859 by-laws disclose that that institution conceived of a selected and nondescendible membership

And again (App 48)

> If transferability did not inhere in membership of Hiberma of 1859, the by-laws of 1864 did no more than make express that which was implied, and they did not operate retroactively at all

Furthermore, appellants themselves assert the 1864 incorporation was undertaken pursuant to the members [of Hiberma of 1859] authorization and certain acts of the Legislature (App 20) The Second Amended Complaint alleged that the members of Hiberma of 1859 authorized its trustees to incorporate Hiberma under the Acts of 1862 and 1864 This not only was a consent that the new corporation supersede the old, but it was an authorization to the trustees to form the kind of corporation

wherein the directors would have all of the powers conferred upon directors by those acts, including the power to adopt the by-law specifying how and when membership should terminate. Consequently, the members of "Hibernia of 1859" themselves authorized the by-law prescribing that a membership was strictly personal.

II. The Procedural Contention.

Appellants' procedural contention is that "due process" was denied by not allowing "cross-examination". This is a highly imaginative characterization of what occurred. The judgment of the court of first instance was rendered on motion for summary judgment. Appellees called no witness to the stand. What appellants did was to subpoena an officer of Hibernia to bring to the hearing of the motion *all* of its records for 100 years and then seek to call him to the witness stand, in person, and through him to offer, *en masse*, this vast volume of records without pointing to any document as being relevant to any issue. It was this procedure, and nothing more, that the court declined to permit (App. 17-20).

A. THE PROCEDURAL QUESTION WAS NOT TIMELY OR PROPERLY RAISED.

Appellants do not contend that they raised this contention in the trial court at all or until the last page of their third brief in the court below.[5] Under California practice "a question smuggled into a closing brief merits scant consideration", *Faus v. Pacific Electric Ry. Co.*, 146 C.A. 2d 370, 379; 303 P.2d 814, 821. Moreover, this constitutional contention was then *abandoned*, for appellants did not make it in their subsequent petition to the California Supreme Court for hearing; the procedural argument in that petition rested solely on alleged principles of state law. This

5 "Appellants' Reply to the Respondent's Supplemental Brief"

Court has said that it does not review questions which the litigant does not first tender to the highest state court. *Missouri v. Gehner*, 281 U.S. 313, 320.

B. MOREOVER, THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

Appellants complaint is that they were not allowed to introduce or inquire about certain documents. But, as the opinion below shows, the only point on which the documents were supposed to bear was the question whether some memberships in "Hibernia of 1861" had been allowed to descend (App. 15-20). But that question is irrelevant to the basis on which the court independently placed its decision, namely, that Mel and Masten never became members of Hibernia at all.

C. IN ANY EVENT THE PROCEDURAL FEDERAL QUESTION SOUGHT TO BE PRESENTED IS NOT SUBSTANTIAL.

The California summary judgment procedure, Cal. Code Civ. Proc. Sec. 437(c), is similar to the federal summary judgment procedure stated in F.R.C.P. Rule 56 and extended on April 17, 1961 to admiralty causes by this Court's new Admiralty Rule 58. Motions for summary judgment are decided on the pleadings, admissions, depositions and affidavits. There is no provision for a trial or for oral testimony of witnesses in court. The court below upheld the ruling of the court of first instance on two grounds. First, it is "contrary to normal procedure" to call witnesses to the stand on the hearing of a motion for summary judgment (App. 18). Second, California procedure does not permit the offer of bales of documents *en masse* (App. 19-20). California practice permits extensive discovery procedure, inspection, interrogatories and utmost scope in depositions (Cal. Code of Civil Proc. Sec. 2016-2035). The record shows that appellants propounded and received answers to interrogatories and *stipulated* that they had all the inspection they wanted. Had they desired,

they could have pursued the inquiry through depositions. The effect of the liberal discovery and summary judgment procedures of modern practice is to rationalize litigation by requiring spadework to be done out of court, instead of clogging the calendar by having it done at trial. This Court long ago held that "the due process clause does not guarantee * * * any particular form or method of * * * procedure", and, particularly, does not require that one be permitted to subpoena witnesses to testify instead of relegating him to depositions. *Hurwitz v. North*, 271 U.S. 40, 42; *Iowa Central Railway v. Iowa*, 160 U.S. 389.

CONCLUSION

It is respectfully submitted that the appeals should be dismissed.

Dated: San Francisco, California, July 7, 1961.

MOSES LASKY
JAMES FARRAHER
Attorneys for Appellees

Office Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

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Appellant,

vs.

THE HIBERNIA BANK, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF RICHARD M. TOBIN, DECEASED, FLORENCE ADELE TOBIN, JOSEPH O. TOBIN, EDWARD J. TOBIN, CYRIL R. TOBIN, CONSTANCE DE YOUNG TOBIN, BEATRICE TOBIN RAOUL-DUVAL, RUTH HAWKINS TOBIN, ABBY PARROTT TOBIN, CELIA TOBIN CLARK, RICHARD RAOUL-DUVAL, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF CHARLES J. BARRY, DECEASED, ERNEST O. McCORMICK, JR., LEO O'GRADY, SHELDON G. COOPER, JOSEPH O. TOBIN, TRUSTEE, CYRIL R. TOBIN, TRUSTEE, RICHARD RAOUL-DUVAL, TRUSTEE, ERNEST O. McCORMICK, JR., TRUSTEE, SHELDON G. COOPER, TRUSTEE, DOES ONE TO FIFTEEN,
Appellees.

APPELLANTS' ANSWER TO APPELLEES' MOTION TO DISMISS

M. MITCHELL BOURQUIN,
711 Crocker Building, San Francisco 4, California,

GEORGE OLSHAUSEN,
1238 Pacific Avenue, San Francisco 9, California,

Attorneys for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 176

ALICE MASTEN SPENCER, as Administratrix, etc.,
Appellant,

vs.

THE HIBERNIA BANK, a corporation, et al.,
Appellees.

ALICE MASTEN SPENCER, et al.,
Appellants,

vs.

THE HIBERNIA BANK, a corporation, et al.,
Appellees.

MARIAN MEL, as Special Administratrix of the Estate of John Mel, Deceased,
Appellant,

vs.

THE HIBERNIA BANK, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF RICHARD M. TOBIN, DECEASED, FLORENCE ADELE TOBIN, JOSEPH O. TOBIN, EDWARD J. TOBIN, CYRIL R. TOBIN, CONSTANCE DE YOUNG TOBIN, BEATRICE TOBIN RAOUL-DUVAL, RUTH HAWKINS TOBIN, ABBY PARROTT TOBIN, CELIA TOBIN CLARK, RICHARD RAOUL-DUVAL, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF CHARLES J. BARRY, DECEASED, ERNEST O. MCCORMICK, JR., LEO O'GRADY, SHELDON G. COOPER, JOSEPH O. TOBIN, TRUSTEE, CYRIL R. TOBIN, TRUSTEE, RICHARD RAOUL-DUVAL, TRUSTEE, ERNEST O. MCCORMICK, JR., TRUSTEE, SHELDON G. COOPER, TRUSTEE, DOES ONE TO FIFTEEN,
Appellees.

APPELLANTS' ANSWER TO APPELLEES' MOTION TO DISMISS

In citing the opinion of the Court below, we use the paging of the Appendices to our Notice of Appeal and Jurisdictional Statement.

I. CORRECTIONS OF MISSTATEMENTS IN MOTION TO DISMISS

Before discussing appellees' arguments, we correct some misstatements or misleading statements which occur in the Motion to Dimiss.

A. At page 3, note 2 appellees say, *inter alia*, "the case involves no dormant account". The District Court of Appeal, however, considered this as one of the aspects of the litigation.

App'x A, p. 34:

> "The member who did not exercise such right to deposit contributed nothing to the bank. A by-law could reasonably sever a right left *dormant* and unused: . . ." (Italics added.)

B. An erroneous impression may follow from Appellees' statement on p. 10 of their motion, namely that "Appellees called no witness to the stand." *But appellees did offer affidavits.* When *appellants* tried to call one of the affiants to the stand, *appellees objected, and the court did not even allow the witness to be put on the stand.* The question was actually never reached whether appellees' records had to be offered piecemeal or could be offered *en masse*. This appears both from the opinion and the record.

See App'x A, p. 18:

> "Appellants first contend that upon a hearing of a motion for summary judgment an affiant may be called as a witness and questioned as to the basis of his averments in the manner appellants attempted to follow in the instant case."

See R____ in *Spencer v. Hibernia*, No. 19194 DCA (p. 7, line 25 to p. 8, line 15 and p. 14, lines 21-24 of testimony following pleadings and motion papers).

"February 13, 1959

Reporter's Tr. No. 19,194, 7:25-8:15

Mr. Olshausen. Before we start the argument, we want to call Mr. David Barry to the stand with the documents which he has been subpoenaed to bring.

Mr. Lasky. If the court please, on a motion for summary judgment oral testimony is not permissible; the Code section itself is quite clear upon that matter.

The Court. Yes. Do you have any authority to the contrary? It is my understanding that the purpose of a summary judgment is to determine the matter on affidavits.

Mr. Olshausen. . . . We want the record to show wh.. was stated earlier this afternoon, that we subpoenaed Mr. David J. Barry, who made an affidavit here, who is the vice-president and one of the officers of the Hibernia Bank, and he is present under subpoena to bring the records of the Hibernia Bank into the court from the beginning up until the present time. I think it is 18,700 pages which are mentioned in Mr. Tobin's affidavit."

14:21-24:

"The Court. Well, I will certainly grant you that, I think I better cross this particular bridge at this time and the Court will sustain the objection to any testimony by Mr. Barry at this time."

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Besides, the District Court of Appeal's mention of offering records *en masse* does not deal with the availability of cross-examination, but solely with the state-court question whether appellees' objection to evidence was sufficient. See Juris. State., App'x A, pp. 19-20.

C. On p. 10 appellees suggest that the complete denial of cross-recommendation was "smuggled in"—"under California practice a question smuggled into a closing brief merits scant consideration: *Faus v. Pacific Electric Ry. Co.*, 146 C.A. 2d 370, 379, 303 P. 2d 814, 821."

But the question was not "smuggled in"—it was part of Appellants' Reply to Respondents' Supplemental Brief *which was filed by special leave of court*. (The order granting leave to file was signed by Presiding Justice Bray on the face of the original; we specially asked that this order be made part of the record—we have not seen the record as it was sent to the Supreme Court.)

II. OBJECTIONS TO RETROACTIVE OPERATION OF STATUTES OF 1862 AND 1864 WERE TIMELY RAISED; PRESENT SUBSTANTIAL QUESTION; NOT ANSWERED ON AN ADEQUATE STATE GROUND

Appellees argue (pp. 4 ff) (1) that the case does not come within *Missouri v. Gehner*, 281 U.S. 313 or *St. Louis Ry Co. v. Sunburst Oil Co.*, 287 U.S. 358, holding that a constitutional issue is timely if raised upon petition for rehearing where it arises from the nature of the State Court's decision itself; (2) that there is an "adequate state ground because the District Court

of Appeal *construed* the organizational papers of 1859 as not creating any contract or property rights; and (3) that the asserted unconstitutionality of a state statute, not previously before the U.S. Supreme Court, is supposedly "insubstantial". We answer these points in order.

A. Question of Constitutionality of Statutes Timely Raised in Petition for Rehearing

1. Constitutionality under XIVth Amendment Raised by District Court of Appeal Itself

So far as unconstitutionality under the XIVth Amendment is concerned, the District Court of Appeal itself considers this question:

> (App'x A, p. 36) "Appellants in substance contend that the by-laws could not validly sever the right of descendibility and that neither legislative enactment nor by-law provision could remove the member's right of descendibility without violation of due process."

2. Justification Under State Statute Raised for First Time by District Court of Appeal

a. Neither the articles of incorporation of 1859 nor the by-laws of 1859 contained any express provision either that withdrawal of cash balance should forfeit membership, or that membership should be non-descendible. *Subsequent* by-laws provided *both* that membership should be lost by withdrawal of cash balance and that membership should be non-descendible.

If these provisions are taken to be merely *private enactments* they could be construed as being *private*

breaches of contract. But the moment the later by-laws *are held to carry out a state statute*, they become state action, and they stand or fall with the validity of the state statute as thus construed and applied.

Section 4 subd. *Sixth* of Cal. Stats. 1862, p. 199 (see p. 10 of Jurisdictional Statement) contains only the most general language, giving a corporation power—

> "*Sixth*—To make by-laws, not inconsistent with the laws of this State, for . . . the time and manner in which any person may become or may cease to be a member of the corporation . . ."

The California rule of construction is that statutes are ordinarily construed as operating *prospectively*. (*Krause v. Rarity*, 210 Cal. 644, 293 P. 62, 66.)

The District Court of Appeal *for the first time* holds *(and appellees make no contention to the contrary)* that this general language authorizes by-laws cutting off *rights which antedate both the statute and the by-laws*. We recapitulate the statements in the opinion to this effect:

> (App'x A, p. 35) "If Mel and Masten became members of Hibernia of 1864 they were bound by the terms of such membership, which carried with it the authorization to the board of directors *pursuant to the Act of 1862, to pass the by-laws in question*, and these by-laws severed descendibility in view of the decisions in *Bennett and Doyle*." (Italics except case names added.)
>
> (id. p. 36) "As we shall explain, the legislature validly *empowered* the board to fix the composi-

tion of the membership by enacting the Act of 1862 (Stats. 1862, p. 200)." (Court's italics.)

(id. p. 37) "Indeed it (*Bennett v. Hibernia*, ~~49~~ 47 Cal. 2d 540) states the opposite: the right of transferability survives only in the *absence* of such a statute or by-law." (Court's italics.)

(id. pp. 37-8) "The two decisions thus sustain the *legislative power* to give Hibernia the right to determine its composition and *to exercise any claimed right of transferability in members of Hibernia of 1859*. . . . The legislature gave a complete and unlimited right to determine membership." (Italics added.)

In the previous quotation *(supra)* the District Court of Appeal itself had said that *Bennett v. Hibernia,* 47 Cal. 2d 540 held that 'in the *absence of a statute* membership rights in Hibernia of 1859 were transferable. The District Court of Appeal for the first time holds that the general language of Sec. 4, subd. *Sixth* of Cal. Stats. 1862, p. 199 is a statute authorizing the destruction of these preexisting rights.

b. The previous appeal of *Bennett v. Hibernia Bank,* 47 Cal. 2d 540 had first said that (p. 551 ff) the members had property interests in the Hibernia of 1859; (pp. 551-2) that in the absence of a statute or by-laws to the contrary these rights were transferable; (p. 552) that a later by-law terminating membership upon withdrawal of deposit was not binding on members of the 1859 organization if it would unreasonably impair their membership rights. The statute of 1862 (Cal. Stats. 1862, sec. 4, subd.

Sixth) is mentioned only insofar as it authorized *directors* rather than members or stockholders to enact laws. See *Bennett v. Hibernia Bank,* 47 Cal. 2d 540, 551.

> "The power to adopt by-laws is ordinarily in the stockholders or members of the corporation, but directors may be given such authority by statute or articles of incorporation. . . . The 1862 act provided that the 'corporate powers of the corporation shall be exercised by a Board of not less than five Directors;' and it contained a list of corporate powers, one of which was to 'make by-laws, not inconsistent with the laws of this State,' for certain enumerated purposes. (Stats. 1862, p. 200.) Under the 1862 act, one of the purposes for which the corporation, and hence the directors, could make by-laws was to regulate 'the time and manner in which any person may become, or may cease to be, a member of the corporation.' (Stats. 1862, p. 200.) This language was broad enough to permit the directors to adopt by-laws specifying the conditions under which membership rights might be acquired or lost."

Bennett v. Hibernia Bank, 47 Cal. 2d ~~150~~ 540, was a decision of the California Supreme Court, and a decision on the previous appeal of the companion case to the cases at bar. (*Doyle v. Hibernia,* 156 Cal. App. 2d 16, was concerned with a membership originating in 1889, and had nothing to do with the question of retroactivity. See App'x A, p. 43.) So far as the Supreme Court decision of *Bennett v. Hibernia* goes, it is the direct opposite to holding that the general language of Cal. Stats. 1862, p. 199, sec. 4 authorized by-laws cut-

ting off pre-existing rights. As stated above, this idea is injected for the first time by the District Court of Appeal itself. It was therefore timely to raise the constitutional objections to the statute thus construed and applied, on Petition for Rehearing. *Missouri ex rel. v. Gehner*, 281 U.S. 313, 320; *Gt. No. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367.

3. Motion to Dismiss Does Not Dispute That District Court of Appeal Actually Ruled on Constitutional Question Raised on Petition for Rehearing

We made the point (jurisdictional Statement p. 18) that the District Court of Appeal actually ruled on the claimed violation of constitutional rights by a retroactive statute. In denying the Petition for Rehearing it *modified its opinion so as to hold in effect that there supposedly was no retroactivity. Appellees nowhere mention this point in their motion to dismiss.*

In case our jurisdictional statement was not sufficiently clear we quote the passages which show exactly what the District Court of Appeal did in denying rehearing. In its original opinion it had said—

> (App'x A, p. 44) "Since the drafting of by-laws necessarily followed the filing of articles, the corporation in the very process of formation would inevitably be saddled with rights of members which the by-laws could not retroactively impair."

In its modification of opinion on denial of rehearing (App'x B) the District Court of Appeal inserted the phrase "upon appellants' hypothesis" after the word "formation" in the above sentence, and put quotation

marks around the word "retroactively" so that the sentence finally reads—

> "Since the drafting of the by-laws necessarily followed the filing of the articles, the corporation in the very process of formation *upon appellants' hypothesis,* would inevitably be saddled with rights of members which the by-laws could not '*retroactively*' impair". (Italics added.)

Here the court affirms that rights of members are being impaired; but by putting quotation marks around the word "retroactively" it clearly intends to deny that there actually is any retroactivity. Thus it admits impairment of membership rights but seeks to deny the claim of impairment-of-obligation-of-contracts by denying retroactivity. It rules on the constitutional claim under Art. I, sec. 10 (contracts clause) by denying retroactivity. Since the state Court actually ruled on the constitutional question raised on Petition for Rehearing, the question was timely raised. *Gt. No. Ry. Co. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358, 367.

B. No Adequate State Ground of Decision

Appellees claim there was an "adequate state ground of decision" because the District Court of Appeal *construed* the certificate of incorporation and by-laws of 1859 as granting neither property rights in the assets of the corporation nor any transferable rights. *Long Sault Dev. Co. v. Call,* 242 U.S. 272, 277, is cited (motion to dismiss p. 7).

There are three answers to this. *First,* when a subsequent statute is attacked as impairing the obligation

of contracts, the state Court's *construction* of the contract—whether it gives constitutionally protected rights—is part of the federal question. Otherwise a state could always circumvent the contracts clause of the constitution by "construing" a contract as not granting any rights, even in the face of earlier decisions to the contrary—as was actually done in the cases at bar (see below). *Long Sault Dev. Co. v. Call*, 242 U. S. 272, did not involve construction, as we show *infra*.

Second, a large part of the holding of the District Court of Appeal is not whether the 1859 documents granted any rights at all, but whether the rights which were granted are *sufficiently substantial to be constitutionally protected*. This, of course, is a federal question.

Third, In view of the bizarre history of this litigation (which we set forth more fully below) nothing said by the District Court of Appeal in its present opinion, can be held to furnish an "*adequate*" state ground of decision.

1. Construction of Contract Federal Question

Long Sault Development Co. v. Call, 242 U.S. 272 did not involve *construction* of the contract which was claimed to be impaired. The "contract" was a state statute (242 U.S. 272, 273, 274-5). The state court held this statute unconstitutional under the state constitution *as it existed when the act was passed*. 242 U.S. 272, 278-9.

Previous to its holding, the Court, by way of *dictum* had treated the *construction* of the contract as a federal question:

> (pp. 276-7) "The grants of the Act of 1907 are such that, if it was a valid law, upon their being accepted, *they constituted property or contract rights,* of which the plaintiff could not be deprived, and which could not be impaired by subsequent legislation . . ." (Italics added.)

The District Court of Appeal does not hold the documents of 1859 to be void as in conflict with any contemporaneous state law. Instead, it *construes* them as (1) not granting property or contract rights (2) not granting membership which survives withdrawal of cash deposit (3) not granting rights which survive transfer. We cite the pages of Appendix A to the Jurisdictional Statement—pp. 22, 23, 26, 31, 45-48; Appendix C, p. 64.

But *construction* of the contract claimed to be impaired, was not only recognized by *dictum* as part of the federal question in the *Long Sault* case, 242 U.S. 272, but was so held in *La. Ry. & Nav. Co. v. Behrman,* 235 U.S. 164, cited on p. 19 of our Jurisdictional Statement. This Court there said,

> (pp. 169-70) "the judgment was affirmed by the supreme court of the state upon the ground that the contract was 'subject to a suspensive condition, and that this condition has become impossible of realization, and the contract had, in consequence, fallen through, when plaintiff made its attempt to begin work and the injunction was taken' ".

Here the state Court *interpreted* the contract as being ineffectual.

The Supreme Court answered this by saying,

(p. 170) "The defendant in error moves to dismiss, invoking the established rule that where the state court gives no effect to the subsequent enactment, the jurisdiction of this court does not attach (cases). We are of the opinion that the present case is not within this rule. It is equally well settled that where the state court does give effect to later legislation which operates to impair the obligation of a contract *if one exists*, this court is not deprived of jurisdiction because the *state court has put its decision upon the ground that the contract was not made*, or that it was invalid, or that it has become inoperative. *In such a case, this court must determine for itself whether there is an existing contract.* Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, *and this court might be of the opinion that there was a valid contract*, which thereby would be impaired, it would be powerless to enforce the constitutional guaranty (cases)."

(p. 171) "And in determining whether effect has been given to the later statute, this court is not limited to the mere consideration of the opinion of the state court. (cases) In the present case it is apparent that the whole object of the suit was to establish the right of the city to carry out the subsequent ordinance, . . . It must follow that this court has jurisdiction to determine whether that claim is well-founded; that is *whether there is a contractual obligation* which the plaintiff in

> error is entitled to enforce without its being impaired by the operation of the subsequent provision having, by virtue of state authority, the force of state law." (Italics added.)

In the present case the motions for summary judgment were based *entirely* on the later by-laws, which the District Court of Appeal upholds because "the Legislature gave complete and unlimited right to determine membership." (Jurisdictional Statement, App'x A, p. 38.) Moreover the bases on which the District Court of Appeal finally decided the case correspond exactly with the subsequent by-laws (Jurisdictional Statement, App'x A, p. 52): ". . . appellants' case neither surmounts the discontinuation of their predecessors' depositorship in Hibernia nor their deaths of more than a half century ago."

Finally, the District Court of Appeal's construction of the documents of 1859 is the *direct opposite* from that made by the California Supreme Court of the *same documents* in the prior appeal of the companion case, *Bennett v. Hibernia Bank*, 47 Cal. 2d 540. The *construction* of the 1859 documents has not even been uniform, with the construction by the state Supreme Court in favor of the contractual obligation. (We examine this point in greater detail below, in arguing that the opinion of the District Court of Appeal does not in any event furnish an *adequate* state ground of decision.) The *subsequent* by-laws are what the motions for summary judgment invoked, and the only unequivocal holding made by the District Court of Appeal.

2. Substantiality of Contractual Right Claimed Is Federal Question

To a large extent the District Court of Appeal does not hold that there is *no* contractual right, but merely that the rights are too "insubstantial" to receive constitutional protection. See Jurisdictional Statement, App'x A, pp. 33-4, 50-51. The question whether a right is *sufficiently substantial to receive constitutional protection* is clearly a federal question.

3. Statements of District Court of Appeal Do Not in Any Event Furnish "Adequate" State Ground of Decision

The bizarre history of this litigation is that on both of the two substantive points (survival of membership after withdrawal of deposit; transferability of membership) the District Court of Appeal holds directly contrary to the language of the Supreme Court of California in *Bennett v. Hibernia Bank,* 47 Cal. 2d 540, but yet the Supreme Court denied a Petition for Hearing, with Justice Peters dissenting. (Justice Peters was on the District Court of Appeal at the time of the first appeal of the *Bennett* case, and wrote an opinion reaching the same result as that ultimately reached by the Supreme Court in *Bennett v. Hibernia,* 47 Cal. 2d 540. Justice Peters' opinion may be found in 289 P. 2d 57.)

Thus the Supreme Court said (1) that the 1859 members had property rights (2) which are transferable; and (3) that by-laws forfeiting membership on withdrawal of deposits are inapplicable to a member of 1859 if they unreasonably deprive him of membership rights. The District Court of Appeal holds *contra* all three points (1) that members in the 1859

corporation had no property rights and (2) what rights they had were not transferable (3) that membership did not survive withdrawal of deposits.

a. We quoted part of the language of the California Supreme Court on page 21 of the Jurisdictional Statement. The following language shows the State Supreme Court's position on both of the first two points:

> (47 Cal. 2d 540, 551-2) "Hibernia was organized as a business and profit organization, and the members had property rights in the assets of the corporation. In the absence of a statute, by-laws or other regulation to the contrary these rights were transferable."
>
> (47 Cal. 2d 540, 552) "A by-law adopted in 1868 provides in part: 'No one shall be deemed a member whose account is once closed.' Since this by-law was adopted after Curtin became a member it would not be enforceable against him, in the absence of his consent, if it would unreasonably deprive him of his membership rights."

Whether such a by-law would "unreasonably deprive him of his membership rights" is a question which could arise only if membership survived the closing of the account, before the by-law was passed.

b. The District Court of Appeal first states that the Supreme Court recognized a right of transferability:

> (App'x A to Juris. State. p. 37) "Indeed it [the State Supreme Court] states the opposite; *the right of transferability* survives only in the ab-

> sence of such a statute or by-law" (Italics added; Court's italics omitted)

—and then proceeds to hold the opposite from the Supreme Court on all three points:

(1) It holds that the members of 1859 had no property rights (App'x C to Jurisdictional Statement, p. 64, quoted Jurisdictional Statement pp. 21-2);

(2) The District Court of Appeal holds that membership was not transferable (App'x A to Jurisdictional Statement, pp. 45-48);

(3) The District Court of Appeal held that membership does not survive the withdrawal of a deposit (App'x A to Juris. State. pp. 21-31).

In California, the Supreme Court's denial of a hearing after decision by the District Court of Appeal does not constitute an approval of the decision on the merits. *People v. Rabe,* 202 Cal. 409, 418-19; *Bohn v. Bohn,* 164 Cal. 532, 537-8; *People v. Davis,* 147 Cal. 346, 350.

If the opinion of the District Court could be called an overruling decision, it would raise new problems. (Cf. *Gelpcke v. Dubuque,* 68 U.S. 175, 206 cited in Juris. State. p. 22.) If, as we believe, it is *not* an overruling decision, then we submit, it furnishes no *adequate* state ground of decision insofar as it contradicts the California Supreme Court in *Bennett v. Hibernia,* 47 Cal. 2d 540. (We have found no precedent for this situation.)

C. Answer to Other Contentions on Substantiality

On p. 8 of the Motion to Dismiss, appellees try to brush aside the XIVth Amendment on the ground that it was not adopted until 1868, but insofar as the Acts of 1862 and 1864 are *treated as operative after 1868* they would have to meet the test of the XIVth Amendment (the Civil War Amendments were clearly intended to nullify pre-existing legislation which did not conform to them—e.g., the XIIIth Amendment with respect to pre-existing slave laws).

On pp. 9-10 of the Motion to Dismiss, appellees quote the language (Juris. State. App'x A, p. 20) that "appellants themselves assert the 1864 incorporation was undertaken pursuant to the members' authorization and certain acts of the Legislature". This language relates to the *first count of* the amended complaint (claiming a partnership) which is *not the subject of this appeal.* The District Court of Appeal nowhere claims that Masten and Mel as members of the 1859 organization *consented* to the destruction of their memberships. On the contrary, it holds that such destruction was authorized by *statute.* (Juris. State. App'x A, p. 38, quoted above.)

The remainder of pages 8 and 9 of the Motion we have already answered.

III. DENIAL OF DUE PROCESS THROUGH DENIAL OF CROSS-EXAMINATION UNDER CAL. CCP 437c (Motion to Dismiss pp. 10-12)

We have already answered appellees' preliminary contention, *supra*, pp. 2-4.

A. Objection to Denial of Cross-Examination Timely Raised

1. We have already shown that the constitutional objection to total denial of cross-examination was not "smuggled in" but included in a brief filed by special leave of Court. *Supra*, p. 4.

2. Appellees' claim that the point cannot be raised because it was not *repeated* in the Petition for Hearing by the Supreme Court. They cite *Missouri v. Gehner*, 281 U.S. 313, 320 for the proposition that the constitutional issue must be raised before the "highest" state Court. But *Missouri v. Gehner* came up from the Supreme Court of Missouri so the question now raised was not involved. Here the District Court of Appeal *was* the "highest state court", the California Supreme Court having denied a hearing. This has always been the holding with respect to cases coming up from California. *Stromberg v. California*, 283 U.S. 359, *sub nom. People v. Mintz*, 106 Cal. App. 725, 290 P. 93; *I.A.M. v. Gonzales*, 356 U.S. 617, *sub nom. Gonzales v. I.A.M.*, 142 Cal. App. 2d 207.

We submit that the phrase "the highest state court" does not mean two different things. It is the same Court whether for purposes of determining from which Court an appeal is taken (28 U.S.C. 1257)

or for determining where the constitutional question must be raised. Here it was the California District Court of Appeal.

3. On page 4 of the Motion, appellees claim that we did not designate a statute sufficiently to sustain an appeal—citing *Charleston Ass'n v. Alderson*, 324 U.S. 182, 185. (As to the substantive statutes, this was the entire burden of our Petition for Rehearing.) The reference to denial of due process under the XIVth amendment, on p. 13 of Appellants' Reply to Respondents' Supplemental Brief (Juris. State. p. 17) followed a discussion which *dealt entirely with the operation of Cal. CP 437c*. The claim of unconstitutionality was made unmistakably with reference to this Code section. But if the reference should be thought not sufficiently definite, then the point would be ground for granting *certiorari*, under appellees' own citation of *Charleston Ass'n v. Alderson*, 324 U.S. 182, 185.

B. No Adequate Non-Federal Ground (Motion to Dismiss p. 11)

Appellees claim that the District Court of Appeal held one stated purpose of cross-examination irrelevant and that therefore a total denial of cross-examination *ab initio* raises no separate federal question. But *Alford v. U.S.*, 282 U.S. 687, 694 holds that cutting off all cross-examination *in limine* makes a basically unfair trial regardless of any stated purpose of the cross examination. As we showed in our Jurisdictional Statement (pp. 20-21) denial of the basic elements of fairness is denial of due process.

C. Federal Question Is Substantial (Motion to Dismiss pp. 11-12)

Appellees claim that total denial of *cross-examination* raises no substantial federal question because *discovery procedure* (including depositions) was open to appellants. Appellees cite the California discovery sections (Cal. CCP 2016-2035) which, significantly, the District Court of Appeal does *not* cite. In other words not even the District Court of Appeal suggests that discovery procedure may dispense entirely with opportunity for cross-examination.

Cross-examination comes into play *after* the opponent has given direct evidence. On a motion for summary judgment the direct evidence is the moving party's affidavits. Discovery-depositions could be a substitute for cross-examination only if they were available in the short period between the noticing of the motion for summary judgment (with affidavits) and the hearing on it. Neither the District Court of Appeal nor appellees themselves suggest that this is possible. It is clearly not contemplated as general procedure, since the basic notice is 10 days for both proceedings. See Cal. Code Civ. Proc. 437c, quoted in Jurisdictional Statement; and Code Civ. Proc. 2019, quoted in part as it read on Feb. 13, 1959, in Appendix "A" to this reply. (Any period less than 10 days is made exceptional under CCP 2019 and, at the time of these motions, itself required a motion.) The problem is resolved by the District Court of Appeal's holding that Cal. CCP 437c permits *no* cross-examination. (See below.)

Moreover, *Alford v. U.S.*, 282 U.S. 687 itself shows that discovery is no substitute for cross-examination.

There *the defendant's counsel had made discovery.* They knew that a prosecution witness was in custody of the federal authorities. (282 U.S. 687, 690.) But the fact that the defense had this information, did not prevent the total denial of cross-examination from making an essentially unfair trial.

Hurwitz v. North, 271 U.S. 40, 42; *Iowa Cent. Ry. v. Iowa.* 160 U.S. 389 merely hold that no denial of due process arises from a requirement that witnesses must be examined on deposition rather than in open court. They do not deal with total denial of cross-examination *in any form.* That, however, is what the District says is what Cal. CCP 437c provides. (Juris. Statement, App'x "A", p. 19, the italics on "without" are the Court's.)

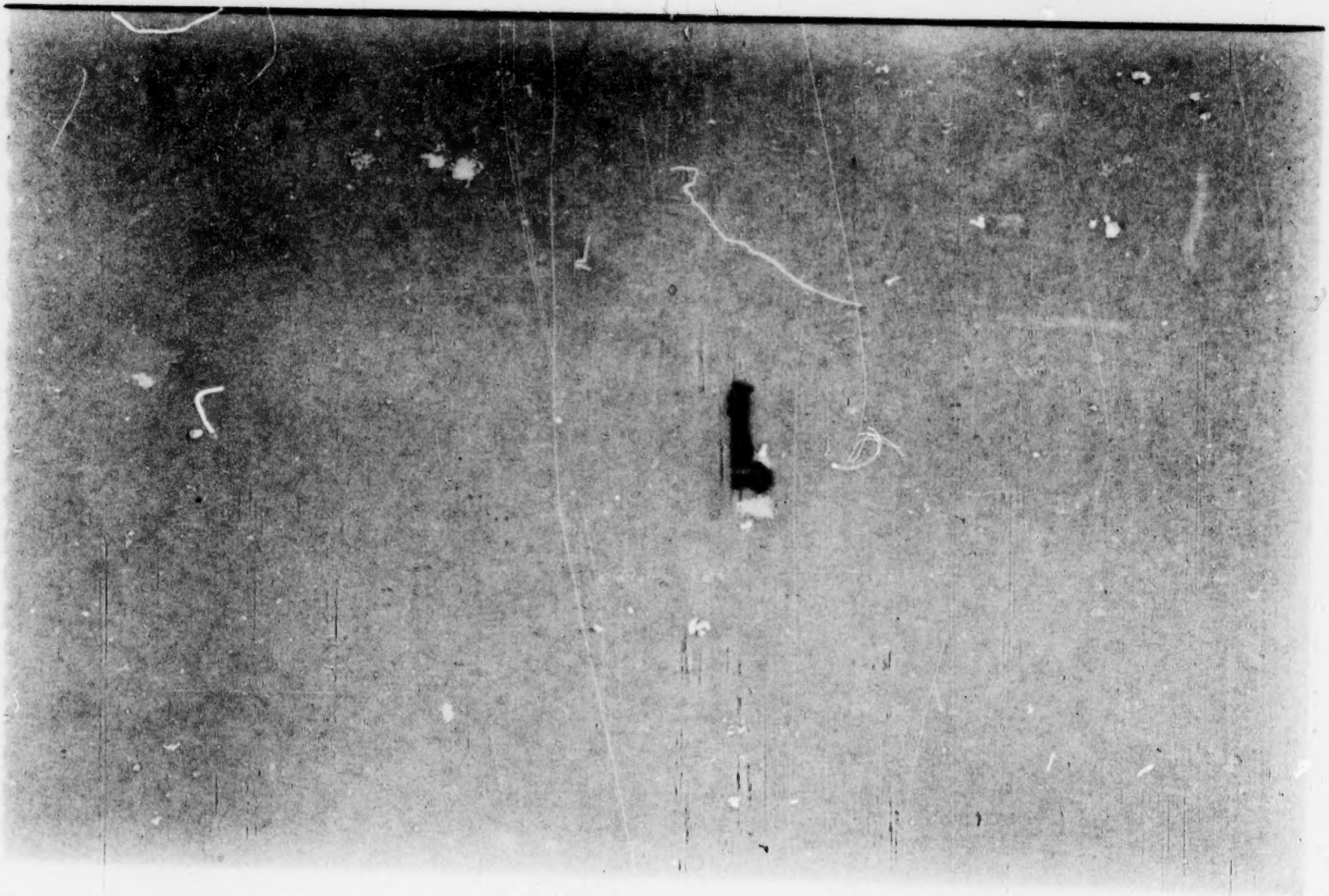
CONCLUSION

It is submitted that the motion to Dismiss the Appeal should be denied: and Probable Jurisdiction noted.

Dated, San Francisco, California,
August 17, 1961.

Respectfully submitted,
M. MITCHELL BOURQUIN,
GEORGE OLSHAUSEN,
Attorneys for Appellants.

(Appendix "A" Follows)



Appendix "A"

Cal. Code Civ. Proc. 2019 (as it read in Feb. 1959)

"*Matter of Taking Oral Depositions*

(a) (1) A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, ... Such notice must be at least 10 days, adding also one day for every 100 miles of the distance of the place of examination from the residence of the person to whom notice is given, except that on motion of any party upon whom the notice is served the court may for cause shown enlarge or shorten the time. . . ."